

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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In Re:) Case No. 19-30088
) Chapter 11
PG&E CORPORATION AND PACIFIC)
GAS AND ELECTRIC COMPANY) San Francisco, California
) Wednesday, February 26, 2020
Debtors.) 10:01 AM
)

OMNIBUS OBJECTION OF THE
OFFICIAL COMMITTEE OF TORT
CLAIMANTS (SUBSTANTIVE) TO
NO-LIABILITY CLAIMS, FILED BY
THE DEPARTMENT OF HOMELAND
SECURITY / FEDERAL EMERGENCY
MANAGEMENT AGENCY (CLAIM NOS.
59692, 59734 & 59783) FILED
BY OFFICIAL COMMITTEE OF TORT
CLAIMANTS [4943]

OMNIBUS OBJECTION OF THE
OFFICIAL COMMITTEE OF TORT
CLAIMANTS (SUBSTANTIVE) TO
CLAIMS, FILED BY CALIFORNIA
GOVERNOR'S OFFICE OF
EMERGENCY SERVICES (CLAIM
NOS. 87748, 87754, & 87755)
[5096]

COURT'S INTENTIONS RE:
PROPOSED ORDER RE: MOTION TO
APPLY RULE 7023, AND ORDER
SETTING DEADLINE [5042]

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

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PG&E Corp. and Pacific Gas and Electric Company

1 SAN FRANCISCO, CALIFORNIA, WEDNESDAY, FEBRUARY 26, 2020,

2 10:01 AM

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4 (Call to order of the Court.)

5 THE CLERK: All rise. Court is now in session, the
6 Honorable Dennis Montali presiding.

7 THE COURT: Good morning, everyone.

8 IN UNISON: Good morning, Your Honor.

9 THE CLERK: Matter of PG&E Corporation.

10 THE COURT: All right, we're scheduled to go with the
11 oral arguments on the claim objection. I'm ready to go.

12 Anybody want to take any out of order first?

13 All right, let's go with the TCC's objections to the
14 FEMA claim. You going to do that argument, Mr. Julian? I have
15 one question for you, but go ahead. Are you going to -- do you
16 have anything preliminary?

17 MR. JULIAN: Yeah, I'm just going to set it up, Your
18 Honor. The TCC and the debtors have allocated twenty-five
19 minutes to their opening and reserving five minutes. Mr.
20 Goodman of BakerHostetler will argue the TCC objection filed by
21 Mr. Zumbro for the debtors.

22 THE COURT: Okay.

23 MR. JULIAN: I wish to state only that the factual
24 issues that we have raised in our objections and supplemental
25 objections, including our January 9 supplemental objection

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1 detailing FEMA's alleged negligence, is not before you today.

2 THE COURT: Right.

3 MR. JULIAN: Legal issue only. The Sharon Zimmerman
4 type of letters that you received, therefore, are not before
5 you as to why FEMA's claim should be denied.

6 THE COURT: Well, if I agree with your basic premise,
7 we never get to the supplement.

8 MR. JULIAN: Exactly.

9 THE COURT: Okay. All right.

10 MR. JULIAN: I'll turn it over to Mr. Goodman, Your
11 Honor. Thank you.

12 THE COURT: Mr. Goodman, good morning.

13 MR. GOODMAN: Good morning.

14 THE COURT: Let me make one preliminary comment, Mr.
15 Goodman. I've read extensive briefs, and the time is somewhat
16 limited. So you can make whatever argument you want, but I
17 think the question of the literal wording of Section 317 in the
18 FEMA's -- in the Stafford Act is pretty laid out, and I don't
19 think you need to go back and -- go back and do that.

20 I have one specific question, though. In your
21 thorough briefing -- and I compliment both sides for extensive
22 briefing. But in your reply, what you didn't comment on are
23 three cases that were cited by FEMA, I believe; but whether
24 they were cited by FEMA, they were cited by now-retired
25 Justice -- Former Judge Kennedy in the City of Flagstaff case.

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1 And so in that case, when the Court is deciding the
2 free-services issue and interpretation, it -- the decision
3 cites three cases that are out of circuit -- one Seventh
4 Circuit -- no, two Seventh Circuit, excuse me, and one district
5 court, I think. And there was no discussion of those. And so
6 if you don't know them offhand -- this isn't a quiz; I'm not
7 going to grade you. But what the decision seems to say is that
8 there are exceptions, and then they gave examples of
9 government -- getting around the free-services doctrine.

10 So to the extent that you can help me on that and then
11 on anything you think that are (sic) particularly pertinent to
12 the alternative arguments that FEMA has made about nuisance and
13 unjust enrichment or anything else you want to argue -- and I'm
14 not going to limit you beyond that, but that's the question
15 that's on my mind.

16 MR. GOODMAN: Sure. If it's a quiz --

17 THE COURT: Yeah, it's a quiz.

18 MR. GOODMAN: -- we're prepared --

19 THE COURT: Go for it.

20 MR. GOODMAN: -- for that one. So we're on page --

21 THE COURT: I'm not going to grade you this morning.

22 MR. GOODMAN: Well, you'll let me know.

23 We're on page 324 of the Flagstaff decision --

24 THE COURT: That's right.

25 MR. GOODMAN: -- at 719 F.2d 322; 1983 --

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1 THE COURT: Right.

2 MR. GOODMAN: -- Ninth Circuit decision. This follows
3 from the Ninth Circuit's conclusion that the City of Flagstaff
4 would not have a claim, based on the free-public-services
5 doctrine, for the trail derailment containing hazardous
6 materials. So the city has at this point lost.

7 THE COURT: Right.

8 MR. GOODMAN: Right. And the Court is now addressing
9 some of the cases that have been raised by the city. So I
10 would note I don't view this as part of the core holding, but
11 let's --

12 THE COURT: No, it's not.

13 MR. GOODMAN: -- let's go through it.

14 THE COURT: It's a throwaway. I mean, it's sort of
15 like we'll deal with that some other time.

16 MR. GOODMAN: Right. So let's go through each of the
17 cases that the Ninth Circuit referred to on page 324 of the
18 decision. And the quote I think that you're keying on is,
19 "Recovery has also been allowed where the acts of a private
20 party create a public nuisance which the government seeks to
21 abate".

22 THE COURT: Correct.

23 MR. GOODMAN: So the first case is Town of East Troy
24 v. Soo Line Railroad Co.; it's a Seventh Circuit case from
25 1980. That case involved the application of a Wisconsin

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statute that gave "any person, county, city, village, or town"
a right to assert an action to abate a public nuisance. So
that case actually involved a statutory claim, which would be
similar to California law permitting CAL FIRE to recover fire-
suppression costs.

THE COURT: Like the health and safety in --

MR. GOODMAN: Correct.

THE COURT: -- 19-003 or --

MR. GOODMAN: Right.

THE COURT: You know the numbers.

MR. GOODMAN: Right; nothing unusual about that one.

The next case referred to by the Seventh Circuit is
the City of Evansville v. Kentucky Liquid Recycling. This is
another decision by the Seventh Circuit. That case involved an
intrastate dispute over the discharge of contaminants into the
Ohio River. The federal common law of nuisance applied there
because it was an intrastate dispute where federal common law
has been found to exist. There's no such dispute here. So
that would fall --

THE COURT: Well, there's no intrastate concept,
obviously.

MR. GOODMAN: Correct. There's no federal common law
that would apply to PG&E in this context, would be my point, in
terms of the federal-common-law rule that was developing,
involving riparian rights and water moving between states; a

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1 creature that was specific to that context. So that case would
2 fall squarely within that line of authority.

3 The next decision that's cited by the Ninth Circuit is
4 United States v. Illinois Terminal Railroad. Again, that was
5 another case involving navigable waters, and in that case it
6 was the Illinois River.

7 And fourth, we have the United States v. Chesapeake &
8 Ohio Railway. That case involved a claim by the United States
9 Forest Service to recover the costs of a fire that had
10 threatened public lands. And that's a key distinction. If a
11 government entity is appearing based on damage done to public
12 property, it would not necessarily be barred by the free-
13 public-services doctrine, because at that point it would be
14 asserting a claim --

15 THE COURT: Oh, a national forest.

16 MR. GOODMAN: -- just like any other --

17 THE COURT: The court said national forest, yeah.

18 MR. GOODMAN: Correct. Right.

19 THE COURT: Okay.

20 MR. GOODMAN: So none of these cases that are cited by
21 the Ninth Circuit on page 324 of the Flagstaff decision would
22 lend any support to FEMA's claims in this case.

23 THE COURT: So if FEMA had taken some expense --
24 incurred some expense dealing with any fire damage to public
25 land, maybe we'd have a different outcome for that.

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1 MR. GOODMAN: Right. And there are claims in this
2 case, asserted by federal agencies, for damage to public
3 property; the FEMA claim is just not one of them.

4 THE COURT: Okay. Thank you. That's helpful.

5 MR. GOODMAN: Okay. Secondly, I'd also add on to that
6 point, it's not just the free-public-services doctrine that
7 would bar FEMA's nonstatutory claims, but you also have the
8 issue of whether a common-law claim would exist, given the
9 enactment of Section 317 and 312 of the Stafford Act. This
10 would follow under the American Electric Power decision that we
11 cite in our brief. Simply, there can't be no dual track where
12 FEMA can rely on a statute to assert its claims. There's no
13 common-law backup rule at this point. So --

14 THE COURT: Well, but you're not -- this is not a
15 preemption argument, though. This is something else, right?
16 You're not -- I mean, you make -- there is a preemption issue
17 floating around here. But --

18 MR. GOODMAN: It's --

19 THE COURT: -- that's not what we're talking about, is
20 it?

21 MR. GOODMAN: Well, it's both. I think that you get
22 to the same result. If you start with the free-public-services
23 doctrine, I think the conclusion you would reach is that FEMA's
24 claim rises and falls on Section 317 of the Stafford Act. If
25 you come at it from a preemption perspective, again, looking at

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1 the American Electric Power decision from the Supreme Court in
2 2011, "The test for whether congressional legislation excludes
3 the declaration of federal common law is simply whether the
4 statute 'speak[s] directly to [the] question' at issue." Here
5 we have a statute that speaks directly to the question at
6 issue, which is whether FEMA can recover the disaster-related
7 costs for the disaster-related assistance that are (sic)
8 provided here. So all roads lead to the same conclusion, which
9 is that it's Section 317 or bust.

10 THE COURT: Well, but how do I reconcile the argument
11 that, even if Section 317 is not available, not -- I mean, it's
12 available but the words don't work. I mean, you make the point
13 that we're not talking about willful torts. But what about
14 FEMA's argument: well, we've got this common-law California
15 law, common-law nuisance, Health and Safety Code, and whatever.
16 Can't FEMA rely on that?

17 MR. GOODMAN: No.

18 THE COURT: Okay.

19 MR. GOODMAN: They cannot.

20 THE COURT: But again, is it because of preemption or
21 because of this American Electric doctrine or -- what's the
22 label that in your mind closes the door to FEMA coming in that
23 way?

24 MR. GOODMAN: I think the door's closed twice and it's
25 welded shut. There's no escape. Right.

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1 THE COURT: Case over.

2 MR. GOODMAN: It's over. Yes, it is. It really, I
3 think, comes down to that point. I mean, you can't have a
4 dual-track federal-common-law claim when you have a statute
5 that you're invoking this directly on point. I think that's
6 just a basic preemption. There's no federal common law to be
7 had.

8 So even if the federal common law at one point existed
9 that they could rely on, it was negated the second Section 317
10 came into being.

11 THE COURT: Yeah, the Supreme Court yesterday issued a
12 decision on federal common law. You --

13 MR. GOODMAN: Yes.

14 THE COURT: -- familiar with that?

15 MR. GOODMAN: That would be the decision that --

16 THE COURT: The Rodriguez case.

17 MR. GOODMAN: Yes.

18 THE COURT: But it talks about a narrowing of the
19 federal common law.

20 MR. GOODMAN: Right. That decision involved the
21 question of whether a federal tax refund --

22 THE COURT: Yeah, it's a sharing between --

23 MR. GOODMAN: -- would be considered --

24 THE COURT: -- a parent, a sub.

25 MR. GOODMAN: Right. Although, I --

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1 THE COURT: Yeah. I'm quite familiar with the history
2 of that case.

3 MR. GOODMAN: Ironically, though, that decision I
4 always viewed as based on California law, the doctrine of
5 specific trust, which would be a state-law principle. But
6 notwithstanding, the Supreme Court made clear that it doesn't
7 appreciate anything coming under the heading of a federal-
8 common-law claim.

9 THE COURT: It seemed to say that this narrow --
10 very -- it's a very narrow band of jurisprudence called federal
11 common law, because the state law generally occupies these
12 areas, except very specifically. And the court mentioned, for
13 example, admiralty.

14 MR. GOODMAN: Right. And again, riparian rights
15 between states, where you have states fighting over waterways,
16 would be another example where that body of case law has
17 developed. And again, that comes back to two of the cases that
18 were cited by the Ninth Circuit in its decision.

19 THE COURT: Okay. Thank you.

20 MR. GOODMAN: So with that, I think we're down to
21 Section 317 of the Stafford Act, which we would pose at this
22 point. There's a very narrow question to the Court, which is,
23 is that statute an intentional-tort statute or is it a
24 negligence statute? Our position is that it's an intentional-
25 tort statute. And I think that that's fairly obvious

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1 conclusion if you look at the legislative history and the
2 language of the act.

3 And the other thing I would also just note -- and
4 papers on the other side make the point that there's no cases
5 that we've been able to cite involving Section 317 of the
6 Stafford Act. And of course, the reason for that is that FEMA
7 has never invoked Section 317 --

8 THE COURT: Well, but isn't it --

9 MR. GOODMAN: -- of the Stafford Act before.

10 THE COURT: -- isn't that because FEMA generally deals
11 with floods and hurricanes and tornadoes and only rarely the
12 more specific thing like -- and then the cites were to the
13 9/11, and Oklahoma bombing, and things that are acts of
14 tortfeasors. Here we have an act of an alleged tortfeasor.
15 Maybe there's no case cited because it hasn't happened. That
16 doesn't mean --

17 MR. GOODMAN: Well --

18 THE COURT: -- it's not good legal principle.

19 MR. GOODMAN: It's also -- there's a chemical spill in
20 Texas as well.

21 THE COURT: Correct. I understand that.

22 MR. GOODMAN: But, yes.

23 THE COURT: Well, what about Deepwater Horizon? Does
24 that -- did FEMA get involved in that? And is there any help
25 in what happened there? I don't know. I just read the

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1 newspaper. Do you know?

2 MR. GOODMAN: I recall asking that question during the
3 deposition, and I'm not recalling the precise answer --

4 THE COURT: Okay. Well, then don't worry about it.

5 MR. GOODMAN: -- offhand. But I think the answer was
6 no.

7 THE COURT: That's okay. The point -- we both agree.
8 I think, and I suspect that FEMA's counsel will agree too,
9 happily there aren't many intentional tort events that cause
10 FEMA to get up and do what it has to do.

11 MR. GOODMAN: Well, I think, if you look at the
12 Oklahoma City bombing and 9/11 as examples, it's not just an
13 intentional tort act but it also seems to be the availability
14 of a potential recovery. Right? And they didn't pursue the
15 claim in the Oklahoma City bombing, but I'm not sure that there
16 would have been a recovery to pursue.

17 THE COURT: No, I'm sure not, but that doesn't mean
18 that they couldn't have if there had been a recovery. I mean,
19 the point -- there's no -- there was no legal prohibition. I
20 mean --

21 MR. GOODMAN: Right. In that context --

22 THE COURT: -- we know what happened there. Okay.

23 MR. GOODMAN: -- where you have someone blowing up a
24 building, I would agree that you would have an intentional act
25 that would give rise to a claim under Section 317.

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1 THE COURT: All I'm saying is, if you had a tragedy of
2 that nature where there was a culpable person or entity that
3 could respond, maybe there would have been some precedent. The
4 fact that there wasn't doesn't mean that there might not be in
5 some case in the future.

6 MR. GOODMAN: I would agree.

7 THE COURT: That's all.

8 MR. GOODMAN: Yeah. Well, I'm not sure -- you've
9 clearly read our papers quite --

10 THE COURT: Well, that's what I'm --

11 MR. GOODMAN: -- extensively --

12 THE COURT: -- supposed to do, you know?

13 MR. GOODMAN: Yeah. -- and seem very familiar with
14 the arguments that we've set forth in terms of the legislative
15 history, how the word "condition" --

16 THE COURT: What would you have done if I said I
17 haven't read the briefs yet, just -- you got twenty-five
18 minutes to educate me?

19 MR. GOODMAN: I think I would go through the reply
20 brief almost verbatim, Your Honor. But you've --

21 THE COURT: No, go ahead, and make whatever argument
22 you want.

23 MR. GOODMAN: Again, I think it's just -- it comes
24 down to a very straightforward question of statutory
25 interpretation, which is, does Section 317 apply when what you

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1 have -- what you're faced with are allegations of negligence.

2 THE COURT: Right.

3 MR. GOODMAN: And we --

4 THE COURT: Well, let's switch topics again, then. I
5 focused on your arguments about nuisance and unjust enrichment.
6 And I'll certainly ask counsel on the other side to -- this
7 unjust enrichment I don't quite understand at all. But you
8 also have this other argument about void. And I understand;
9 you're talking a very broad policy. But I don't know what to
10 make of that argument. I mean, it -- you're making it, so do
11 you want to help me understand what --

12 MR. GOODMAN: Sure. If --

13 THE COURT: -- I do there?

14 MR. GOODMAN: Again, if the Court agrees with our
15 reading of the statute, I don't know that the Court would
16 even --

17 THE COURT: No.

18 MR. GOODMAN: -- get to that point.

19 THE COURT: That's true.

20 MR. GOODMAN: I think that the voidness issue comes
21 when you look holistically at the impact of these claims in
22 this case, and the fact that an agency that is committed to
23 providing assistance to fire victims, yet, given the fact that
24 we are in bankruptcy where you have limited dollars, not
25 everyone can walk away from this proceeding paid in full. The

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1 consequence of the allowance of a claim of this magnitude, 3.9
2 billion dollars, is that it would severely dilute the recovery
3 of the --

4 THE COURT: But we don't know that.

5 MR. GOODMAN: -- the fire victims of the case.

6 THE COURT: Again, a lot of people that your committee
7 represents feel strongly that that's the case. But we don't
8 know that that's the outcome. And it's not supposed to be -- I
9 mean, it's supposed to be -- you know what the statute says and
10 the laws require, so I won't talk about it. That's essentially
11 what your argument -- but that's not something the Court can do
12 anything about.

13 I mean, how can I -- how can I say a legal theory that
14 defeats one claimant in favor of their opponents applies
15 because of the outcome that it might bear on the surviv -- I
16 mean -- I don't mean -- "survivor"'s not the word I want in
17 terms of the fire, but the residual effect on the equity
18 holders or, if there are (sic) no value for equity to share
19 among the creditors of an insolvent estate, if that's the way
20 out. I don't know that I have any discretion to apply an
21 outcome test here. I have to apply the statute, I think, and
22 the legal principles.

23 MR. GOODMAN: If the Court is the most comfortable
24 with the statute and the legal principles, I feel sufficiently
25 confident in our interpretation of the statute, the plain

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1 language, the legislative history; I mean, they all point in
2 the same direction, which is, this is an intentional-tort
3 statute.

4 THE COURT: Okay. Now, you want to reserve some time?
5 I mean, you're welcome to do what you want. I don't want to
6 cut you off --

7 MR. GOODMAN: I think --

8 THE COURT: -- Mr. Goodman.

9 MR. GOODMAN: -- at this point I would yield the
10 floor. Thank you.

11 THE COURT: Okay, thank you, Mr. Goodman.

12 Mr. Zumbro, good morning.

13 MR. ZUMBRO: Good morning, Your Honor. Paul Zumbro
14 from Cravath, Swaine & Moore, on behalf of the debtors.

15 Your Honor, you began your colloquy with Mr. Goodman
16 with the Court's observation that the literal wording of
17 Section 317 is clear. We agree with that. Your Honor, there's
18 been a lot of bad things said about PG&E over the last couple
19 of years, both inside and outside of this courtroom, but nobody
20 has accused PG&E of intentionally --

21 THE COURT: Well, I think some people have, but at
22 least there hasn't been a --

23 MR. ZUMBRO: There's been no --

24 THE COURT: -- formal procedure --

25 MR. ZUMBRO: Correct. And even taking all of FEMA's

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1 claims, as asserted, as true, they don't rise to a level of
2 intent. I think FEMA makes that clear in the deposition of the
3 30(b)(6) witness. It was clear that they didn't allege that
4 there was an intentional act. They try to sort of come up with
5 this flawed theory of intentional omission.

6 THE COURT: Yeah, that seems to be the way they're
7 trying to get to that point. And I don't know what an
8 intentional omission is.

9 MR. ZUMBRO: I don't know what an intentional omission
10 is either, Your Honor, but I do know that it would have to be
11 an omission that would have the intent of causing the fire. So
12 if, for example, a transformer wasn't maintained because we
13 wanted to start a fire and it started sparking and we
14 intentionally didn't put it out because we intended a fire to
15 start, maybe that would support a claim. But that's clearly
16 not what happened here. They're trying to convert a negligence
17 standard -- excuse me; they're trying to convert an
18 "intentional" standard into a negligence standard. And Mr.
19 Goodman noted, as we point out in our papers, Congress
20 considered that and specifically rejected that. The
21 legislative history is clear that this is an intentional act
22 that's required.

23 THE COURT: Well, but I think the argument's made that
24 there's a whole pattern over a span of years of vegetation
25 management, paying the shareholders, not attending to

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1 transmission lines -- and you know more specifically than I --
2 and that that rises to the level of some sort of culpable
3 omission. I think. I mean, that's what I gather from the
4 argument.

5 MR. ZUMBRO: That seems to be what they're saying,
6 Your Honor, but I don't think that rises to the level of an
7 intent. We did not intend to cause the fires. Even if you
8 take everything that they say, all of those omissions, it would
9 at most amount to negligence, maybe recklessness. But that's
10 not what the standard requires.

11 THE COURT: Is there -- I mean, even if there's a
12 gross negligence, if there's a difference -- and sometimes who
13 knows what the difference is? But even that isn't sufficient;
14 is it?

15 MR. ZUMBRO: Correct. It has to be an intent. I
16 mean, Congress -- this is a very narrow and specific
17 circumstance in which FEMA can recover. As Your Honor pointed
18 out, most of the disasters that FEMA deals with are acts of
19 God, right? It's a hurricane; it's an earthquake. There's
20 nobody you can look to. But in the very limited specific
21 category of manmade acts -- fire, explosion -- that cause --

22 THE COURT: Well, Mr. Goodman touched on one that was
23 not 9/11 or Oklahoma: the chemical spill.

24 MR. ZUMBRO: Correct. Mr. Timothy McVeigh, he went
25 out, he bought the fertilizer --

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1 THE COURT: Right.

2 MR. ZUMBRO: -- he rented the truck, he parked the
3 truck in front of the federal building, and he caused the
4 explosion with an intent to destroy the building.

5 THE COURT: Right.

6 MR. ZUMBRO: That is a far cry from anything that
7 PG&E --

8 THE COURT: Well, and he was --

9 MR. ZUMBRO: -- is alleged to have done.

10 THE COURT: -- and he was prosecuted and convicted
11 under the criminal standard.

12 MR. ZUMBRO: Correct.

13 THE COURT: But what about in -- I don't know what the
14 underlying facts are with the chemical spill that Mr. Goodman
15 described, but what if you had something like that? You could
16 end up with evidence to support an intentional conduct; right?

17 MR. ZUMBRO: You could, but that's not in this case.
18 There is no --

19 THE COURT: Got it. I understand.

20 MR. ZUMBRO: There is no allegation. So I think it's
21 very clear that the applicable law that Your Honor needs to
22 consider when thinking about Section 502(b)(1) of the
23 Bankruptcy Code -- there's no dispute as to what that
24 applicable law is, I don't think; any real dispute. FEMA
25 raises the, sort of, throwaway claims of unjust enrichment or

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1 public nuisance. I think it's clear that the Stafford Act is a
2 comprehensive federal statute that takes the whole area, and
3 there's no alternative mechanism --

4 THE COURT: Well, you go back --

5 MR. ZUMBRO: -- for FEMA to --

6 THE COURT: I mean, you're going back to the same
7 thing that Mr. Goodman was touching on: preemption.

8 MR. ZUMBRO: Correct. Well, it's preemption or
9 preclusion, I guess. The Stafford Act is a comprehensive
10 federal statute; it's designed --

11 THE COURT: I -- yes, I --

12 MR. ZUMBRO: It says specifically.

13 THE COURT: -- I realize that constitutional federal
14 scholars draw a line between preempt and preclude. But as a
15 practical matter, bottom line's the same.

16 What about the Native Village case? That case helps
17 you, doesn't it?

18 MR. ZUMBRO: The Native Village case does help --

19 THE COURT: Yeah.

20 MR. ZUMBRO: -- under the Clean Air Act. And it says,
21 if there's a statute -- there's a comprehensive statute at
22 issue, that's the only mechanism under which a recovery can be
23 pursued. Here there's a comprehensive statute. Luckily, we
24 don't have to talk about all of the details. There's a lot of
25 aspects of the Stafford Act that we're not talking about today.

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1 It's a very complicated statute. But the one area that's
2 relevant for purposes of us today are (sic) clear, as Your
3 Honor said. The words lead to no other interpretation other
4 than the fact that it requires an intentional act. That is the
5 applicable law.

6 THE COURT: Well, there's a lot spent -- and this is
7 perhaps a question better for Mr. Goodman; he wrote the
8 principal brief. But I'll ask you anyway. There seems to
9 be -- the word "intentional act or omission" shows up twice in
10 the same statute. What am I to make of that, other than
11 redundancy?

12 MR. ZUMBRO: Well, it does. Unfortunately, "omission"
13 only shows up once.

14 THE COURT: Yeah -- I guess that's --

15 MR. ZUMBRO: "Omission" shows up at the end. I'll
16 read it. It says --

17 THE COURT: Yeah; no, you're correct.

18 MR. ZUMBRO: It says --

19 THE COURT: Right.

20 MR. ZUMBRO: -- "a person who intentionally causes a
21 condition for which federal assistance is provided", the
22 condition there, in our case, being the wildfires. "A personal
23 who intentionally causes a condition". Right? And then it
24 goes on to say, "is liable to the United States to the extent
25 such costs are attributable to the intentional act or omission

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1 of such person which caused such condition". So you have to
2 read those all together. It clearly says that you have to
3 intend the condition, the condition in this case being the
4 2015, the 2017, and the 2018 --

5 THE COURT: But that seems to draw --

6 MR. ZUMBRO: -- wildfires.

7 THE COURT: -- a fine line between an act of, for
8 example, not taking care of a defective device on a power line
9 versus attending -- the result that follows is the ignition
10 that causes the fire. That -- how do -- that's a very fine
11 line; isn't it?

12 MR. ZUMBRO: It is, but I think it's clear what
13 Congress intended, was, to the extent you need to sort of think
14 about that line, we need to be across the line where you
15 actually intended the result of your action. You have to
16 intend the disaster.

17 THE COURT: Well, that's the standard, for example --
18 and FEMA cites the Bullock case and 523(a)(4), which is --
19 strange cite to fit. But if we look at 523(a)(6) that we in
20 the bankruptcy court do all the time -- I don't know if you're
21 familiar with that section, but it's "willful and malicious";
22 you have to intend what you did and intend the outcome.

23 MR. ZUMBRO: Correct.

24 THE COURT: And that --

25 MR. ZUMBRO: Correct.

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1 THE COURT: And so that seems to be that would have be
2 here too; right?

3 MR. ZUMBRO: Correct.

4 THE COURT: So --

5 MR. ZUMBRO: Correct. And so I think FEMA does try,
6 in its papers, to obscure the very straightforward legal issue,
7 the legal infirmity of its claims, with a bunch of statements
8 about prima facie validity and burdens of proof, and the like.
9 I don't think any of that is relevant to the pure legal issue
10 which is before the Court today, which is, 502(b)(1) says, if a
11 claim is not enforceable, as a matter of applicable law,
12 against the debtor, you must disallow that claim.

13 THE COURT: Well, that's PG&E/Travelers, the United
14 States Supreme Court. We're looking at the losing judge in
15 that case. 9-0.

16 (Laughter.)

17 THE COURT: But that's -- I mean, the Supreme Court
18 just reiterated the point: you look to see is there a defense
19 to the claim, outside of the Bankruptcy Code.

20 MR. ZUMBRO: Correct. We think this claim -- it's not
21 a matter of defense. It's a matter that the claim is facially
22 valid under the law. FEMA cannot -- it has not and cannot
23 bring the assertions that it would need to support a claim of
24 intentional --

25 THE COURT: Well, no, I understand. And one of the

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1 things that was a little surprising from the TCC reply brief is
2 that it suddenly becomes like a 12(b)(6). And I don't know
3 if --

4 MR. ZUMBRO: Correct.

5 THE COURT: -- FEMA or the state agencies have a
6 quarrel with that argument. But it comes down to the same
7 thing. I mean, this is a claim objection, and the claim is
8 like the complaint: that it must be treated as true for
9 purposes of testing the validity of it. And your objection
10 says, taking all those facts, a 12(b)(6) motion to dismiss
11 would be granted if you're right.

12 MR. ZUMBRO: Correct.

13 THE COURT: Same as sustaining the objection.

14 MR. ZUMBRO: That's right. I mean, we looked --

15 THE COURT: Same result.

16 MR. ZUMBRO: -- into that. There doesn't seem to be a
17 lot of law on that.

18 THE COURT: It's the --

19 MR. ZUMBRO: I think --

20 THE COURT: It's the same result.

21 MR. ZUMBRO: There was a case that -- a BAP case that
22 I think Your Honor was actually on the panel, that sort of said
23 that, effectively, it's a 12(b)(6) standard; even though it's
24 not technically a 12(b)(6) standard, it effectively is, because
25 you look at 502(b)(1) and it effectively says --

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1 THE COURT: Well --

2 MR. ZUMBRO: -- if it's not a valid case --

3 THE COURT: Well, I don't remember --

4 MR. ZUMBRO: -- claim --

5 THE COURT: -- the BAP case, but certainly in the
6 context of claims objection it's not -- not infrequently I will
7 say to parties, just make your summary-judgment motion or your,
8 essentially, 12(b)(6)-type motion. You can do it in the
9 context of a claim objection.

10 MR. ZUMBRO: Exactly.

11 THE COURT: Okay.

12 MR. ZUMBRO: And that's effectively where we are here
13 today. I think that the FEMA claim -- it fails as a matter of
14 law, Your Honor. And I guess, with that, we would join
15 respectfully with the TCC's request that the Court disallow
16 those claims in their entirety.

17 THE COURT: Okay. Thank you, Mr. Zumbro.

18 MR. ZUMBRO: Thank you, Mr. -- sir.

19 THE COURT: For FEMA, who -- Mr. Troy, are you on duty
20 today, or your colleague? Good morning.

21 MR. TROY: Good morning, Your Honor. Matthew Troy,
22 Civil Division, United States Department of Justice, on behalf
23 of federal agencies and FEMA in this case. I am not making the
24 argument today --

25 THE COURT: Oh.

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1 MR. TROY: -- Your Honor.

2 THE COURT: Okay.

3 MR. TROY: My colleague from my office, Michael Tye,
4 T-Y-E, will be making the argument.

5 THE COURT: Is he --

6 MR. TROY: He's --

7 THE COURT: -- Mr. Tye here?

8 Okay, good morning, Mr. Tye. Yeah, I saw your name on
9 the briefs.

10 So, Mr. Tye, just before -- same as I did with the
11 other side, I'm going to give you as much time as you're
12 allowed. And I try to limit my questions, but please help me
13 on this one. There seems to be confusion perhaps among the
14 fire survivors and the public and so on. Is there in fact a
15 duplication of claims here between FEMA and the state agencies,
16 by at least two-and-a-half billion dollars?

17 MR. TYE: There is a duplication with respect to some
18 of the claims but, with respect to FEMA's claims, there's over
19 a billion dollars in claims that wouldn't be duplicated with --

20 THE COURT: There wouldn't be. No, I understand --

21 MR. TYE: Yes.

22 THE COURT: -- it wouldn't be. But if your claim were
23 allowed in full, then am I correct, the FEMA piece of the state
24 claim goes away, and vice versa? It's duplicate counting,
25 isn't it?

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1 MR. TYE: I would have to confer with my colleagues on
2 that. There's a one-billion-dollar discrepancy with respect to
3 the two -- I mean, the claim objection here with respect to
4 what the TCC and what the debtors have raised, raised an
5 objection with respect to the whole claim --

6 THE COURT: They do.

7 MR. TYE: -- rise or fall on the same claim.

8 THE COURT: Of course. They do. And I will -- and
9 I'm not trying to turn this into a discussion that isn't the
10 relevant issue. It's a perception -- when I read the briefs
11 and when I read things like criticisms about what's going on in
12 this case, whether public letters, comments, things, everybody
13 uses an aggregate claim of the two federal -- the federal and
14 state agencies, that seems to be double-counting by a
15 substantial sum of money.

16 But leave on -- stick with your argument. You got the
17 full thirty minutes, Mr. Tye. Whatever you want to say. And
18 you've heard the issue, and focus on whatever you think is
19 helpful for your side.

20 MR. TYE: Okay. Great. Just to make clear for the
21 record; my name's Michael Tye. I'm here from the U.S.
22 Department of Justice, on behalf of FEMA and the federal
23 entities.

24 I think I'd like to start, Your Honor, with the
25 Section 317 claims.

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1 THE COURT: Okay.

2 MR. TYE: And as Your Honor noted, the issue before
3 you with respect to the TCC's claim objection is a narrow one.
4 The TCC has specifically conceded that the issue before Your
5 Honor is akin to a motion to dismiss. They're challenging
6 simply the legal validity of the claims. They're not
7 challenging any specific amount with respect to any fire, or
8 any specific claim. They're just challenging the overall legal
9 validity of the claims.

10 Now, with respect to the Stafford Act, both the TCC
11 and the debtors have argued that FEMA's claim is in essence a
12 negligence claim. And that is incorrect. FEMA is not alleging
13 a negligence claim. FEMA's alleging that the conduct set forth
14 in its proof of claim satisfies the standards set forth in the
15 Stafford Act, that there is sufficient intentional conduct here
16 to meet the requirements of the Stafford Act.

17 So their argument that we have asserted a negligence
18 claim is essentially a straw man. We're not arguing that
19 negligence satisfies the statute. We're arguing that the facts
20 of this case satisfy the intentional-conduct element of Section
21 317.

22 THE COURT: But intentional tort typically means you
23 intend the act and intend the consequences of the act; right?

24 MR. TYE: I -- we --

25 THE COURT: So what's the act that was intentional

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1 here?

2 MR. TYE: Right. First, I disagree with the premise,
3 first of all. If you look to page 14 in the TCC's reply brief,
4 they cite the Restatement of Torts, Section 8A, that sets forth
5 the principles underlying an intentional act. And that section
6 provides that "[a]ll consequences which the actor desires to
7 bring about are intended, as that word is used in this
8 Restatement. Intention, however (sic), is not limited to
9 consequences which are desired. If the actor knows that the
10 consequences are certain, or substantially certain, to result
11 from his act, and [he] still goes ahead, he is treated by the
12 law as if he in fact desired to produce the result." And
13 that's exactly what we have here.

14 THE COURT: Well, what is the act? What specific act?
15 I mean, if -- the restatement talks about if you intend to kill
16 A and you throw a bomb into a room where A -- you believe A is,
17 and you kill B, it's still an intentional act. But what is the
18 intentional act that is specific?

19 MR. TYE: Sure. The intentional acts and omissions
20 that are at issue here are the failure to maintain PG&E's
21 lines, with knowledge --

22 THE COURT: Any particular line?

23 MR. TYE: What's that?

24 THE COURT: Any particular line?

25 MR. TYE: I mean, the lines -- the evidence has been

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1 set forth in PG&E's -- or, excuse me, in FEMA's claim
2 objection. And we would note that the 2013 CPUC report
3 specifically found that PG&E's distribution system had
4 significant safety issues --

5 THE COURT: But, Mr. Tye, suppose you had a completely
6 negligently maintained power line that never ignited, and then
7 you had one that was perfectly maintained that did ignite.
8 Would there be intentional tort as to both of -- I mean, well,
9 the one that doesn't -- the one that's negligently maintained
10 doesn't create a fire, so there's no tort.

11 MR. TYE: But I --

12 THE COURT: So the wrong, if you will, is neglecting
13 the power -- the component of the power line. But if there's
14 no fire, there's no tort.

15 MR. TYE: But --

16 THE COURT: So how do we draw the line here?

17 MR. TYE: We draw the line based on the knowledge that
18 substantial risk of this was going to happen in the future.
19 Just as the restatement says --

20 THE COURT: But that requires a reasonable likelihood
21 that the risk will lead to the result; right?

22 MR. TYE: Right, and that's --

23 THE COURT: But in my example, if you throw the bomb
24 into the room, you're probably going to kill somebody, even
25 though it may not be your target. That's right out of the

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1 restatement, by the way. I didn't make it up.

2 MR. TYE: Right. No, and I --

3 THE COURT: Okay.

4 MR. TYE: -- I think that's akin to what happened
5 here. The debtor specifically knew that a fire -- wildfire was
6 likely to result from their faulty maintenance of the lines.
7 And the evidence in this case shows that. There was a fire in
8 2015 and yet the debtor didn't change their conduct. There was
9 a fire in 2017 and yet the debtor didn't change their conduct.
10 They had specific knowledge of what would happen based on their
11 faulty line, that wildfires would ignite, and yet they chose
12 not to act. That type of conduct satisfies the intentional-
13 conduct requirement under Section 317.

14 And just with respect to -- Mr. Goodman went into his
15 interpretation of the statute. And we would like to point you
16 to the second part of that statute, which provides that a party
17 shall be liable to the United States for the reasonable costs
18 incurred in responding to a disaster or emergency, to the
19 extent that such costs are attributable to the intentional acts
20 or omission of such person which caused the condition for which
21 federal assistance is required. And the conduct that we have
22 alleged in our proof of claims satisfies that standard. We're
23 not arguing that negligence is sufficient to satisfy the
24 standard.

25 This is a very unusual case where you have a pattern

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1 of conduct on the part of a party, over a course of many years,
2 where not only did they have knowledge that these faulty lines
3 existed, but they had knowledge that fires would result from
4 them. And they had several fires in succession, giving them
5 actual knowledge of what would happen with the result. In this
6 situation, under the restatement standard, that is intentional
7 conduct.

8 THE COURT: But no court has ever used 317 to apply
9 that restatement; right?

10 MR. TYE: That is correct but, Your Honor, we would
11 point out that no case has -- no court has been called upon --

12 THE COURT: No, I --

13 MR. TYE: -- to look at Section 317.

14 THE COURT: I understand --

15 MR. TYE: Yeah.

16 THE COURT: -- but now one has.

17 MR. TYE: Correct, and --

18 THE COURT: Okay.

19 MR. TYE: -- and we would argue that --

20 THE COURT: And so it --

21 MR. TYE: -- the conduct satisfies the standard.

22 THE COURT: But remember, I'm a bankruptcy judge and
23 we deal with things like intentional torts often, and we focus
24 on conduct that has a target, has a consequence. How would
25 I -- if I were going to buy your argument, how would I explain

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1 to PG&E what specific event caused the harm? I don't have any
2 one thing to point to; right? I can't point -- I can point to
3 the allegations, perhaps, for the Camp Fire, the particular
4 hanging device that appears to have been the culprit. Not for
5 Tubbs Fire, though; right? What would I do about the -- do we
6 divide and take your claim and break it down into -- and
7 there's a week (ph.) trial of all the specific things, or --
8 how does it get administered, from your point of view?

9 MR. TYE: I think --

10 THE COURT: So, contrast Camp and Tubbs.

11 MR. TYE: Right. I think Your Honor's statement
12 earlier that this is equivalent to a 12(b)(6) motion is where
13 this comes in here. And they've alleged that, if you take all
14 the facts and you believe that all of those are true with
15 respect to the proof of claims, that our claims are still -- do
16 not satisfy -- or do not provide a legal basis for a claim.
17 And that just is incorrect.

18 THE COURT: Do you have any reported federal civil
19 cases where 12(b)(6) motions have been denied because of --
20 well, I should say granted and survive because of general
21 allegations of a pattern as distinguished from a specific
22 event?

23 MR. TYE: I don't have those right before me, Your
24 Honor, but we would be happy to provide those if that's
25 material to your decision.

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1 THE COURT: Well, I don't know if it's material or
2 not, but I thought you were focusing on omission as kind of a
3 way to get to the intent. And so what you're saying is, well,
4 no, we look at this whole pattern. And I'm saying, okay, the
5 whole pattern has a panoply of events, and some of them might
6 have contributed to the outcome, but some of them might not
7 have contributed to any outcome.

8 So how would I -- I don't know how I would then dice
9 the claim. You would say it's all or nothing on your claim,
10 then; right?

11 MR. TYE: I think we would say that, with respect to
12 this claim objection, it's all or nothing because of the way
13 that the issue has been presented. Now, if the TCC wanted to
14 make specific objections to specific fires and they wanted to
15 build a record with respect to specific objections to specific
16 fires, that would be a different story and we could respond to
17 those claims. But they haven't done that. Just, that record
18 doesn't exist for them to make specific objections with respect
19 to specific claims.

20 I mean, they specifically provided, in their briefs,
21 that there is supplemental arguments that were --

22 THE COURT: No.

23 MR. TYE: -- targeted at specific --

24 THE COURT: That's -- no, I understand, I understand.
25 So, no, we're back to the question -- using the 12(b)(6)

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1 standard, your view would be, on a motion to dismiss, that
2 motion should be denied because you've alleged in your proofs
3 of claim, the three proofs of claim, a pattern that, when taken
4 as an aggregate series of allegations, arises to the conclusion
5 that, on those uncontested facts, a trier of fact could
6 conclude that the debtors are liable under an intentional-tort
7 standard? Right? Have I got it right?

8 MR. TYE: I think you have it partially right, Your
9 Honor.

10 THE COURT: Okay.

11 MR. TYE: So we are arguing that there is -- there are
12 two, essentially, aspects to this. First you have to have --
13 first you have the evidence of PG&E's repeated failure to
14 maintain its lines over a period of time. And second, you have
15 evidence that the actor knew that the consequences were certain
16 or they were substantially certain to result from those acts.
17 When you have both of those elements together, that would
18 satisfy the requirements of Section 317.

19 THE COURT: Well, again, I'm having trouble getting,
20 to be more specific -- and you're going to tell me we're not
21 talking specifics, and I'm agreeing with you, but that's the
22 dilemma. What if we had hypothetically two situations, two
23 places, where PG&E was grossly negligent in how it maintained
24 the transformer. One of them blew up and burned some people
25 and killed them. The other one didn't do anything. So are

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1 they intentionally liable -- for what? In other words -- in
2 other words, how do we quantify the conduct? I don't know what
3 to do with that.

4 So how would I answer that example? Concede that two
5 transformers were negligently maintained, but only one of them
6 ignited and caused harm.

7 MR. TYE: Right, but --

8 THE COURT: Therefore, what?

9 MR. TYE: -- until you have the ignition that causes
10 the harm, you don't have the tort. So if it's just in its
11 state of not causing harm, then there's no tort. I don't think
12 there's -- I don't think there's a question between those two
13 decisions --

14 THE COURT: Okay.

15 MR. TYE: -- which would provide liability.

16 THE COURT: Okay. All right. I got you. Do you want
17 to say anything about the preemption issue or the --

18 MR. TYE: Yeah. Yeah, yeah.

19 THE COURT: -- preclusion issue?

20 MR. TYE: So let's go and move on to the public-
21 nuisance claims. And the United States takes the position that
22 these public-nuisance claims are governed by federal common
23 law. And federal common law applies in this case because,
24 under the United States v. Kimbell Foods, Inc. -- that's 440
25 U.S. 715, 726 (1979), a Supreme Court case, which provides that

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1 federal law governs questions involving the rights of the
2 United States arising under nationwide federal programs. And
3 that's the situation we have here. The question of whether the
4 United States can maintain a claim for public nuisance with
5 respect to FEMA's activities arises under federal law and,
6 thus, federal common law governs that claim.

7 THE COURT: What does Native Village say in the Ninth
8 Circuit?

9 MR. TYE: Native Village is -- we would say, is
10 distinguishable from the present --

11 THE COURT: But it is --

12 MR. TYE: -- situation.

13 THE COURT: -- binding on me and the trial courts.
14 Ninth Circuit case. So why is it distinguishable? It's a
15 different statute, I agree; it's clean-water. But --

16 MR. TYE: Right. And I think it's the nature of the
17 statute that makes it distinguishable. In Native Village you
18 had a statute, the Clean Air and the Clean Water Act, that
19 governed the question -- the climate-change questions at issue
20 in that case. And that was a comprehensive statute in which
21 the EPA had opined on a specific standard and the specific
22 causes of action. And you had a state bringing a claim,
23 seeking to expand the claims beyond what the federal government
24 had -- both what Congress had said and what (sic) the agency
25 had interpreted that statute.

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1 But here this issue of a public-nuisance claim is not
2 addressed at all one way or another in the statute. Congress
3 created the statute knowing that the federal common law
4 existed. The courts have long applied a public-nuisance claim
5 under federal common law. And this statute just isn't the same
6 kind of comprehensive statute that is at issue in --

7 THE COURT: Okay. So let's go back --

8 MR. TYE: Sure.

9 THE COURT: -- let's go back -- and we can forget --
10 we'll put Native Village aside -- and let's pretend for the
11 moment that Section 317 isn't available to you. So FEMA comes
12 to the rescue after something has gone wrong. And in fact, if
13 somebody is the worst tortfeasor ever but never causes damage,
14 FEMA never gets the call. So isn't that different? I mean,
15 what -- I don't remember what the facts of Kimbell Food -- or
16 if they even are relevant facts. But it seems to me that this
17 notion of federal common law -- what's the principle of common
18 law that applies here?

19 MR. TYE: The principle of common law that applies
20 here is just the public-nuisance claim itself.

21 THE COURT: But the nuisance only manifests itself
22 after the fact. It's not like -- it's not like the hog farm or
23 the other cases that are decided, where the nuisance is
24 ongoing. Right? Something -- it's only when it all comes
25 together, when the -- the careless conduct, the ignition, the

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1 injury. And FEMA still doesn't come until the president does
2 his declaration and the governor -- you know, all the things
3 that make FEMA work. And this is not a criticism of FEMA, but
4 it's only then that FEMA is in the job of cleaning up the mess.
5 Right?

6 MR. TYE: I don't disagree with that, but I don't
7 think that's the standard. Federal common law provides the
8 standard for which -- unjust-enrichment claims in this case.
9 And the standard, the Ninth Circuit has made clear, for public-
10 nuisance claims under the federal common law, is an
11 unreasonable interference with a right common to the general
12 public, and that that unreasonable interference caused
13 widespread harm to the public.

14 THE COURT: When I went to law school, unjust
15 enrichment was you got something that you weren't entitled to.

16 MR. TYE: Oh, I -- excuse me. I misspoke.

17 THE COURT: You know the drill.

18 MR. TYE: I meant public nuisance. Yes.

19 THE COURT: Yeah. But I want -- let's go to unjust
20 enrichment.

21 MR. TYE: Okay. Sure. Yes.

22 THE COURT: So, okay, then we both know what unjust
23 enrichment was: I got something that I shouldn't have. You
24 inadvertently leave your wallet here today when you leave, and
25 I say, "Hah, Mr. Tye left his wallet. I'll keep the money."

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1 That's unjust enrichment, and you're entitled to it back.

2 Where's the unjust enrichment here --

3 MR. TYE: Sure. Yeah --

4 THE COURT: -- for PG&E's conduct and the damage that
5 followed, to the --

6 MR. TYE: Right. The debtors have benefited from
7 FEMA's taxpayer-funded programs that aided the survivors. If
8 the debtors don't pay restitution to the federal government,
9 they privately gain, making the government shoulder the
10 financial aftermath --

11 THE COURT: Why is that --

12 MR. TYE: -- caused by the debtor's conducts.

13 THE COURT: Why is that unjust enrichment? That's
14 just -- I mean, first of all, the debtors are being asked to
15 pay. And they will have to pay; a lot. They may not pay FEMA
16 if the arguments are persuasive here. But I don't know -- why
17 does that translate to unjust enrichment?

18 MR. TYE: Because they're retaining a benefit --

19 THE COURT: What's the benefit?

20 MR. TYE: The benefit is that they were -- that the
21 federal government provided all this disaster assistance --

22 THE COURT: Okay, well, then you're equating unjust
23 enrichment as to something that someone else took
24 responsibility for, for whatever reason -- and in FEMA's case,
25 it's a statutory creature; Congress said FEMA's there as a last

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1 resort to take care of victims of tragedies, which is --

2 MR. TYE: Right, and we would --

3 THE COURT: Okay.

4 MR. TYE: -- we would pose it with this hypothetical,
5 Your Honor: In the days, weeks, and months following the
6 disasters, when the debtors saw the scores of FEMA personnel,
7 the heavy equipment, tractors, and trailers, did FEMA -- or did
8 the debtors really think that a bill would never come due --

9 THE COURT: Well, it doesn't matter --

10 MR. TYE: -- in that situation?

11 THE COURT: -- what they thought. I mean, maybe I
12 didn't think it either, because -- I mean, that's not the
13 question; is it?

14 MR. TYE: But it --

15 THE COURT: The question is whether the law imposes on
16 the company the consequences of -- or the cost for what FEMA
17 did.

18 MR. TYE: Right, and the benefit that they provided
19 was the disaster assistance itself.

20 THE COURT: But you're going back to did somebody at
21 PG&E say, "Golly, I wonder who's going to pay for that."
22 That's -- but even if they ask that question, that's not the
23 relevant question. The question is whether FEMA, who did the
24 cleanup work, can be compensated, reimbursed, for its effort.
25 Why is that -- I mean, you're making the argument that that

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1 is -- that's unjust enrichment, that it's because of the
2 principle of unjust enrichment that PG&E has to pay. One of
3 the -- the alternative, obviously: you got your statutory
4 argument and your common-law nuisance. But this is an
5 alternative argument; right?

6 MR. TYE: Correct.

7 THE COURT: Okay. Okay. Anything else? I mean, you
8 have ten more minutes to do what you want, Mr. Tye.

9 MR. TYE: Unless Your Honor has any further questions,
10 I think we're --

11 THE COURT: Okay.

12 MR. TYE: -- finished.

13 THE COURT: Thank you very much for your time and
14 presentation.

15 Mr. Goodman?

16 MR. JULIAN: We're going to divide it up a little bit,
17 Your Honor.

18 THE COURT: You can do it.

19 MR. JULIAN: I'm going to answer three questions that
20 you asked; the first one is, essentially, what does the statute
21 say about your hypothetical where the transformer doesn't cause
22 damage. And --

23 THE COURT: Even though it's negligently, if not
24 grossly negligently, almost intentionally, ignored.

25 MR. JULIAN: You hit the nail on the head on the

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1 differences between the statutory construction between both
2 sides. The statute says, "Any person who intentionally causes
3 a condition for which federal assistance is provided", et
4 cetera. Three elements: intentional, causes a condition,
5 federal assistance.

6 Their definition of "condition" -- everyone's been
7 arguing about what "intent" means. Their definition of the
8 condition that PG&E intentionally caused was the failure to
9 maintain the line. I wrote it down when he said it. They've
10 helped us. Our definition of the condition is the property
11 damage that occurred when the fire destroyed the homes.

12 THE COURT: Well, because if there hadn't been damage,
13 FEMA never would have been called upon to begin with.

14 MR. JULIAN: Bingo. So when I got this issue -- Mr.
15 Goodman filed the objection -- I word-searched the word
16 "condition" throughout the whole statute, to determine what is
17 Congress' definition of the word "condition".

18 THE COURT: Well, I think it's in the brief too.

19 MR. JULIAN: And it's defined in Section 316. It
20 refers to the condition of the facility before it was damaged
21 and assistance was granted to restore the facility.

22 ##

23 So if you put the word "damage" into the sentence, any
24 person who intentionally causes the property damage for which
25 federal assistance is required, you see that they have to

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1 intentionally cause property damage caused by a fire. And all
2 they've alleged in their claim and in their discovery answers
3 is that PG&E intentionally caused -- as Mr. DOJ Counsel just
4 said --

5 THE COURT: Tye.

6 MR. JULIAN: -- Tye? Yeah. He said the intentional
7 act was "failure to maintain the line". And if you put that
8 into the sentence of the condition, you see that federal
9 assistance was not granted to restore equipment or for the
10 failure to maintain the equipment line.

11 THE COURT: But that's circular also, right? Because
12 for each hypothetical that says there was no fire, we can talk
13 about what about if there was a fire, therefore FEMA did deal
14 with the condition.

15 MR. JULIAN: But that's not --

16 THE COURT: And where --

17 MR. JULIAN: -- what the --

18 THE COURT: -- where do -- but where do we draw the
19 line to the condition?

20 MR. JULIAN: The condition is property damage. That's
21 where we differ. The condition is property damage. There's no
22 evidence that PG&E intended to cause property damage. And they
23 admit it in their discovery responses, which is why --

24 THE COURT: No, I know they did --

25 MR. JULIAN: -- our 12(b) (6) has turned into a summary

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1 judgment motion, which is the point we make --

2 THE COURT: It doesn't matter if it's 12(b)(6) or
3 summary judgment. I mean --

4 MR. JULIAN: Yeah.

5 THE COURT: -- come on. We're not going to turn this
6 into summary judgment. Mr. Tye didn't complaint about the
7 argument you made in your reply brief, nor did I. And so --

8 MR. JULIAN: Good.

9 THE COURT: -- but I guess what I'm feeling like this
10 is little angels on a pin in terms of condition. The argument
11 that they're making is PG&E caused the condition.

12 Now of course it didn't cause FEMA have to bring its
13 trailers and its bulldozers. And that was the consequence of
14 FEMA carrying out its mission. You've not -- I mean, I know
15 there are criticisms of FEMA, but the TCC institutionally or
16 organization, isn't questioning FEMA's role here, right? I
17 mean, they did what they were supposed to do.

18 Whether they did it --

19 MR. JULIAN: Not at this hearing; at the next hearing.

20 THE COURT: Right, whether they did it adequately or
21 not, is not the point. They did it. And they had to, because
22 that was their statutory responsibility to do it.

23 But I guess what I'm telling you -- I'm having
24 trouble -- just like I asked Mr. Tye to help me know where we
25 draw the line between the act of the actor and the consequence

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1 of the act, I don't know how to draw the line to put this
2 condition -- you want me to put it only on the damage that
3 FEMA's fixing versus the circumstances that led to the damage.

4 MR. JULIAN: I think the statute, if you look at 316
5 and 317 together, says that you must do that, Your Honor.

6 THE COURT: Okay.

7 MR. JULIAN: That they must -- PG&E must have
8 intentionally caused the property damaged caused --

9 THE COURT: Caused the condition.

10 MR. JULIAN: -- by a fire. The condition.

11 THE COURT: Cause a condition.

12 MR. JULIAN: "Condition" means property damage cause
13 by --

14 THE COURT: So --

15 MR. JULIAN: -- disaster.

16 THE COURT: -- so again -- love my hypotheticals. If
17 we had a wrongdoer who had a flamethrower, and he's standing
18 there next to a PG&E power line, and he shoots the flamethrower
19 into the brush, that would be an intentional act that causes
20 the condition, right?

21 MR. JULIAN: If the mens rea was to intentionally
22 cause a fire --

23 THE COURT: Right.

24 MR. JULIAN: -- an arsonist, right, it would cover --

25 THE COURT: Well, the --

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1 MR. JULIAN: -- an arsonist.

2 THE COURT: -- word "arson", of course -- on your
3 side -- the whole question -- I didn't find arson in your
4 briefs, but FEMA argued that you were accusing them -- I mean,
5 I'm sorry, they were accusing you of arson. But I don't think
6 arson ever shows up in the brief. Right? But arson would be
7 necessary for a criminal conviction. But you can have an
8 intentional tort without arson, I presume.

9 MR. JULIAN: You could. But where the intentional
10 tort is causing fire property damage, the statute commands that
11 the claimant prove with evidence that the tortfeasor
12 intentionally caused fire property damage. And that's just
13 missing in this case.

14 THE COURT: Okay.

15 MR. JULIAN: All right, Your Honor, two other things.
16 I don't want to write a law-review article on this. But unjust
17 enrichment is a remedy; it's not a statutory claim for relief.

18 And last, I'd like to answer your question about the
19 overlap. I think the discovery has shown that FEMA is
20 asserting a 3.9-billion-dollar claim for all the fires.

21 THE COURT: Right. I know that.

22 MR. JULIAN: 1.5 of that relates to Tubbs. And so
23 that's why Cal OES only has a 2.4-billion-dollar overlap. If I
24 said "million", I meant "billion".

25 THE COURT: No, I know.

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1 MR. JULIAN: The overlap --

2 THE COURT: I know how the numbers play out, and I
3 read the two claims.

4 Well, let's try -- let me try it this way. If I agree
5 with your side and I strike the FEMA claims, doesn't the Cal
6 OES claim itself go down by 2.4 billion?

7 MR. JULIAN: We think so, yes.

8 THE COURT: I mean -- well, I'll ask them -- their
9 counsel if they agree. It seems to me it's obvious that it
10 should. But I need to -- I need to get a clarification on
11 that. Not that my decision will be based upon the dollars, but
12 rather the consequences. I want to make sure we're not talking
13 about a bigger problem -- I mean, it's a horribly big problem,
14 but maybe it isn't as big as it seems to be.

15 MR. JULIAN: That's our view. And I'd like Mr.
16 Goodman to wrap up with those points.

17 THE COURT: Okay.

18 MR. JULIAN: Thank you.

19 THE COURT: All right, Mr. Goodman, you reserved some
20 time, so --

21 MR. GOODMAN: Yeah.

22 THE COURT: -- you're going to be back for Cal OES, I
23 presume, right?

24 MR. GOODMAN: Yes, I will.

25 THE COURT: All right.

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1 MR. GOODMAN: Thank you, Your Honor.

2 THE COURT: All right.

3 MR. GOODMAN: I just want to clarify one point. It
4 was said earlier that there's no record in this case and that
5 we're just talking about the allegations in the proof of claim.
6 And I think that that's not entirely true.

7 Here, yes, we have the point made that there is an
8 absence of allegations in the FEMA claims about the intent to
9 cause harm, right? But we also do have a record here. We took
10 FEMA's deposition. We took a 30(b)(6) exam of FEMA. And I
11 want to share with you some of the testimony that was offered
12 by FEMA at that deposition, because I think that this would get
13 us to summary judgment in and of itself. So --

14 THE COURT: Well, I think if we start to get to facts,
15 then we have to treat it as summary judgment.

16 MR. GOODMAN: Well, listen to --

17 THE COURT: I mean, they're facts that aren't --

18 MR. GOODMAN: -- this answer.

19 THE COURT: -- they're facts that aren't framed by the
20 pleading. No. I'll let you read it. I'm not saying -- but I
21 read it --

22 MR. GOODMAN: Sure.

23 THE COURT: -- in the brief. You summarized in in the
24 brief. But you can -- you can go ahead and summarize it.

25 MR. GOODMAN: Yeah, the --

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1 THE COURT: But it does bring facts outside the record
2 of the claim and the objection.

3 MR. GOODMAN: Well, the testimony that I'm going to
4 share with you, it's not just that they don't make the
5 allegation that there was no specific intent to cause harm.
6 They have specifically admitted that they have no evidence to
7 prove that there was a specific intent to cause harm.

8 "Q. Does FEMA contend that PG&E had a specific intent to cause
9 harm in the proof of claim that it has filed against PG&E?

10 "A. Well, as stated in the interrogatory, FEMA does not
11 believe that the statute requires a specific intent to cause
12 harm. So we are not going to make that allegation.

13 "Q. Does FEMA have any evidence that PG&E had a specific
14 intent to cause harm in relation to the wildfires for which
15 proofs of claim have been filed?

16 "A. So again, our reading of the statute is that a specific
17 intent to harm is not required, so we will not make such
18 allegation.

19 "Q. The question is, though, do you have any evidence that
20 would support that allegation?

21 "A. --"

22 MR. GOODMAN: And this is critical --

23 "A. We are not making the allegation, and we have no evidence
24 that would support such an allegation."

25 MR. GOODMAN: Admission, FEMA, they have no evidence

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1 of any specific intent to cause harm.

2 THE COURT: Now, one of the arguments they made is
3 they've got half-a-dozen briefs from Robert Julian telling us
4 all how bad PG&E is and how criminal they were and all their
5 intentional acts. Is that legally relevant to today's issue,
6 that Mr. Julian made that argument and others have too -- or
7 that's not -- that's not a -- he doesn't get estopped from
8 making the argument, does he?

9 MR. GOODMAN: I will admit that we have said some
10 things about PG&E in this case, but we have never accused them
11 of arson. And the word "arson" does appear in their --

12 THE COURT: I know, but --

13 MR. GOODMAN: -- in our brief.

14 THE COURT: -- but come on.

15 MR. GOODMAN: And we specifically asked the question.

16 THE COURT: I know. A number of people on your
17 side -- I don't think you've been here in court much, if at
18 all -- but a number of people on the TCC side have not been
19 bashful about using strong words directed at PG&E.

20 The question I'm asking you is does that have any
21 bearing on the challenge that I have to decide today on whether
22 FEMA has a claim or not? I think the answer is it shouldn't be
23 relevant.

24 MR. GOODMAN: I think that's correct, Your Honor.

25 THE COURT: Okay.

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1 MR. GOODMAN: In fact, even more to the point, again,
2 we specifically asked FEMA -- because I was curious myself as
3 to what they were really saying in their proof of claim. I
4 read it, and it didn't make sense to me.

5 So we specifically asked at deposition, "Is FEMA
6 claiming that PG&E or anyone that works for PG&E is an
7 arsonist?

8 "A. FEMA contends that intentional omissions", whatever that
9 means, "of the debtor resulted in a condition related to the
10 fires, but that does not include arson.

11 "Q. Okay. Just to make sure I have a clear answer to this
12 question, we just want to know: is FEMA claiming that PG&E or
13 anyone that works for PG&E is an arsonist?

14 "A. So again, FEMA's claim is that intentional omissions by
15 PG&E resulted in the fires but not that anyone at PG&E is an
16 arsonist."

17 THE COURT: But again, if we get into the whole
18 question of arson, that invites all sorts of criminal-law
19 consequences. I think if what you say is they are not
20 contending that -- I think what they're saying, although not
21 the words -- no one at PG&E intentionally caused the fire.

22 MR. GOODMAN: Correct. And on that point, let's come
23 back to the statute again. And again, this was a question
24 where I was struggling to understand exactly how they were
25 reading the statute and how you could get from condition for

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1 which assistance is provided to a power line.

2 So again, at deposition, we asked this question: "Has
3 FEMA ever gone out and required power lines that it suspects
4 could be faulty in order to prevent a wildfire from happening?

5 "Answer" -- this surprised me -- "Such activity would
6 be outside the scope of FEMA's authority.

7 "Q. Has FEMA ever reviewed power lines that are in need of
8 repair as a major disaster in the absence of a wildfire?

9 "A. It would not meet the definition of a major disaster under
10 the Stafford Act.

11 "Q. So the answer would be no, FEMA has never viewed power
12 lines that are in need of repair as a major disaster in the
13 absence of a wildfire?

14 "A. I think the answer would be that FEMA would not consider
15 repairing power lines prior to disaster as an eligible event
16 under the definition of a major disaster declaration for the
17 Stafford Act."

18 MR. GOODMAN: The term "condition" can't mean the
19 power lines. You can't have a major disaster declaration to
20 fix power lines. That's it. It's over. The claim should be
21 disallowed on that basis.

22 THE COURT: I don't -- I don't know how -- I mean,
23 this -- talk about hypotheticals, maybe you could have a
24 disaster involving power lines that doesn't involve wildfires.
25 I don't know.

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1 MR. GOODMAN: But --

2 THE COURT: It could be -- it could be a grid
3 meltdown -- a grid power loss that is caused by something that
4 causes an enormous disaster but doesn't ignite homes and farms
5 and schools and hospitals, but still causes a lot of damages.

6 But I want to go back to one point, procedurally, and
7 then we're going to be finished. You said -- and your papers
8 said -- this is like a 12(b)(6). Then you said it's like a
9 summary judgment. You don't really want me, do you, to make a
10 ruling -- if I come out your way -- a ruling that finds that
11 there is no -- there was no intention, there was no arson;
12 because if I start making findings on, essentially, a motion, I
13 am inviting error.

14 Trial judges aren't supposed to make findings on
15 motions for summary judgment or 12(b)(6) motions or legal
16 argument on claim objections.

17 MR. GOODMAN: Your Honor, again, we teed this up as
18 akin to a motion to dismiss and through the bankruptcy universe
19 of procedure being what it is.

20 THE COURT: Right.

21 MR. GOODMAN: Because we looked at the proof of claim
22 and realized or concluded that there was no allegations
23 contained within it that would satisfy Section 317.

24 THE COURT: Right.

25 MR. GOODMAN: But we do have very strong admissions

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1 made by a 30(b)(6) deponent --

2 THE COURT: No, I understand.

3 MR. GOODMAN: -- that we think --

4 THE COURT: You do.

5 MR. GOODMAN: -- the Court can take into account.

6 THE COURT: There's no question that if somehow we
7 were not dealing with time pressures and we weren't dealing
8 with the procedural setting of a claim objection, which is a
9 bankruptcy animal -- contested matter -- in a time frame where
10 we're trying to get the claims quantified to deal with
11 disclosure statements and plans; and if this were just running
12 its normal course, maybe you would have made a motion for
13 summary judgment, and you would have supported the motion with
14 the excerpts from the deponent. And maybe the other side would
15 have had nothing to rebut it and you would have gotten you
16 summary judgment.

17 But all I'm saying procedurally is my training is to
18 avoid fact determinations at a point when I'm not supposed to
19 make them.

20 The matter is submitted for FEMA. I appreciate the
21 briefing on both sides. I'm going to go --

22 MR. TYE: Your Honor, if I may just make a couple
23 points --

24 THE COURT: Yes, sir.

25 MR. TYE: -- just very briefly.

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1 THE COURT: Yes, sir, Mr. Tye.

2 Well, okay.

3 MR. ZUMBRO: Just one final point of --

4 THE COURT: Okay, Mr. Zumbro, I'd like to -- okay.

5 MR. ZUMBRO: -- rebuttal. Sorry, Your Honor. Paul
6 Zumbro from Cravath, on behalf of the debtors.

7 Just two quick points. I also wrote down a failure to
8 maintain lines, which the Court quickly pointed out was a
9 negligence standard.

10 But what I also just wanted to note: when Mr. Tye was
11 presenting to the Court, he noted -- he stated that the proofs
12 of claims refers to intentional conduct that caused the
13 wildfires. And while he was giving his presentation, I went
14 back and looked at their actual proof of claims. I'm looking
15 at docket number 4943-5, which is the FEMA proof of claim
16 relating to the Camp Fire.

17 And what it actually says is, "FEMA asserts that the
18 costs expended in disaster assistance were required by a
19 condition caused by the debtor." And what word is missing from
20 that sentence, Your Honor? The word that's missing is the word
21 "intentionally".

22 On that same page the cite the Stafford Act, which
23 says "a person who intentionally causes a condition", but in
24 what they actually assert in the legally relevant document,
25 which is akin to the complaint that we've been discussing, is

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1 just that we caused it. They don't even assert in their
2 pleadings that we intentionally caused it.

3 Your Honor mentioned is it all or nothing. We think
4 it is all or nothing. And, Your Honor, we think the full 3.9
5 billion must be disallowed --

6 THE COURT: Okay.

7 MR. ZUMBRO: -- disallowed as a matter of law.

8 THE COURT: Thank you.

9 MR. ZUMBRO: Thank you.

10 THE COURT: Mr. Tye, you have the final comments,
11 please.

12 MR. TYE: All right. Just a couple of points, Your
13 Honor.

14 With respect to that last point that was made that
15 there's no allegation of intentional conduct in the proof of
16 claim, I'm also looking at the proof of claim right here. And
17 in the very heading of that proof of claim, intentional acts or
18 omission causing a condition resulting in a major disaster, are
19 specifically alleged in the proof of claim. And we've alleged
20 that in the briefs.

21 THE COURT: That's --

22 MR. TYE: So I don't think there's any --

23 THE COURT: -- that's 4943-5?

24 MR. TYE: Yes.

25 THE COURT: What page?

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1 MR. TYE: The very first -- or page 2.

2 THE COURT: Oh, the heading page.

3 MR. TYE: Yes.

4 THE COURT: Okay. Yeah, I didn't take the time when
5 you were up to ask you more specifically about the proof of
6 claim. But because of the complexity of these and obviously
7 the enormity of the claim, I just -- it took a lot to work
8 through them. But I appreciate both Mr. Zumbro and your
9 pointing me to the language.

10 I mean, your point is, I take it, that the heading
11 speaks for itself, and it's consistent with your argument.

12 MR. TYE: Correct, Your Honor.

13 THE COURT: Okay.

14 MR. TYE: The second point is, Counsel mentioned
15 Section 316 of the Stafford Act and suggested that "condition"
16 was defined in that section. And it just isn't, Your Honor.

17 That section has to do with a NEPA exclusion that is
18 irrelevant to this matter, and it's not using the term
19 "condition" in any similar way to the way the term "condition"
20 is used in Section 317. So Section 317 -- or excuse me --
21 Section 316 is irrelevant to how one would interpret the term
22 "condition" in Section 317.

23 THE COURT: Okay.

24 MR. TYE: There's no definition --

25 THE COURT: Thank you very much.

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1 MR. TYE: -- of that.

2 The other thing with respect to the term "condition"
3 that we would like to point out for Your Honor is the statute,
4 when it means "disaster" or "emergency" -- and that's what
5 counsel for TCC and counsel for debtors is essentially arguing
6 that "condition" here is equivalent to the disaster itself --
7 but the statute itself makes a distinction between "disaster"
8 and "emergency".

9 Later in the statute, the statute uses those terms.
10 So clearly Congress, when they wanted the statute to refer
11 specifically to the disaster or emergency, knew how to use that
12 language.

13 THE COURT: In what section? Is that still in 317?

14 MR. TYE: That's in -- it's in 317 itself.

15 THE COURT: It's in 317. Yeah, I have it here. I
16 just didn't take the time to look at it while you were --

17 MR. TYE: Correct. And so when they use the terms
18 "condition", they use the condition purposefully to mean
19 something different from "disaster" or "emergency".

20 THE COURT: Well, what would have happened if somebody
21 up in the North Bay saw several instances of absolute gross-
22 negligent maintenance of power transformers or lines, if they
23 called up FEMA and says PG&E is not doing its job, what would
24 have -- other than a hang-up, what would FEMA have done?

25 MR. TYE: But I --

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1 THE COURT: They probably would have said call PG&E,
2 right?

3 MR. TYE: Right, but I don't --

4 THE COURT: They wouldn't have done anything.

5 MR. TYE: -- think that -- I don't think that's
6 relevant for the purposes here. The statute isn't asking us
7 about that hypothetical, they're asking about the conduct that
8 actually occurred in this case.

9 THE COURT: Well, no, but they're talking about who
10 caused the condition. And Mr. Julian argued -- again, whether
11 it's 316 or 317, he's focusing on you haven't pinned down that
12 there was an intention to cause the condition, because you
13 haven't alleged that there was an intent to cause the fire.

14 You're saying it was an intent to cause some other
15 condition that was obviously a predicate -- maybe a predicate
16 to the fire. Actually, there could have been -- the fire could
17 have been caused by lightning too, we don't know.

18 MR. TYE: But I --

19 THE COURT: In every --

20 MR. TYE: -- I think it's incorrect to suggest that
21 we've only alleged that there's an intent to cause the
22 condition. As I set forth in the previous argument, the
23 Restatement section provides for intentional conduct in
24 situations where there is a substantial certainty of knowing
25 that the event will occur. Right?

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1 And that isn't keyed off of this distinction between
2 "condition" and -- what we think of a condition and what they
3 think a condition. Even if you grant what they think of as the
4 correct interpretation of "condition", under the Restatement
5 section, we've alleged sufficient evidence to meet that
6 standard.

7 THE COURT: Okay, I got you.

8 MR. TYE: And one final point, Your Honor. Just with
9 respect to the issue of whether this should be treated as akin
10 to a 12(b)(6) motion. We think Your Honor is exactly correct
11 that you would be inviting error by delving past the proofs of
12 claims themselves into the record in making additional
13 findings.

14 THE COURT: Well -- and findings. But I still --
15 you're not suggesting that I can't make a legal determination
16 on the state of the pleadings, right?

17 MR. TYE: Correct.

18 THE COURT: Okay. All right. Thank you for -- again,
19 the matter stands submitted. We'll go straight to the TCC
20 objection to the Cal OES claim.

21 MR. TYE: Thank you, Your Honor.

22 THE COURT: Thank you.

23 And, Mr. Goodman, you're back up? We'll use the same
24 allocations, I presume?

25 MR. GOODMAN: Yes, Your Honor.

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1 THE COURT: Mr. Julian, is that true; are you going to
2 share with --

3 MR. JULIAN: Yes.

4 THE COURT: -- the same way?

5 Okay, Mr. Goodman, again, you've got -- I don't have
6 any specific questions for you at the outset.

7 MR. GOODMAN: You don't have any specific questions;
8 what?

9 THE COURT: You want some questions.

10 MR. GOODMAN: That's not fair.

11 This brings us to the Cal OES claim. I also think of
12 this as FEMA claim part 2, because again, all but 290 million
13 of what Cal OES has included in its claims is money that came
14 from FEMA. So I'd just like to dial the clock back for a
15 moment.

16 We're in the 1980s. FEMA goes to Congress and says we
17 would like to have a negligence statute. And Congress says no,
18 you can't. We're going to give you an intentional-torts
19 statute, and that's the end of it.

20 So Section 317, though, isn't the sole statute that
21 FEMA can use to recover disaster-related costs. In fact, a
22 statute that it typically would invoke or has utilized in the
23 past, in the Ninth Circuit, is Section 312.

24 THE COURT: 312. That's the --

25 MR. GOODMAN: 312.

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1 THE COURT: -- the Iniki Hurricane case.

2 MR. GOODMAN: Yes.

3 THE COURT: Right.

4 MR. GOODMAN: That is the hurricane case, absolutely.

5 And that this the duplication-of-benefits statute. And that
6 would apply, under the Ninth Circuit case law, in a situation
7 where you have property owned by a public entity or a state
8 that's damaged by the disaster, right, and FEMA comes in and
9 provides assistance with respect to that, whether it's
10 rebuilding a school or a hospital. And there's insurance on
11 the property.

12 And it takes some time to work the insurance claim
13 through the system --

14 THE COURT: Right.

15 MR. GOODMAN: -- but eventually there is a recovery
16 from the insurance, and the owner of the property can't have it
17 twice. You can't have the assistance from FEMA and the
18 duplicate recovery from the insurance company. So under 312,
19 the money -- the way it sort of works through the system, is it
20 would go through the victim and then back to FEMA, under
21 Section 312.

22 FEMA, as I noted, had asked Congress for a negligence
23 statute and didn't get it. So recently, though, they came up
24 with a very interesting workaround. They have put in a
25 regulation in place that on its face says that a negligence-

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1 based tort claim is a benefit that's available under Section
2 312 of the Stafford Act. So here's what FEMA, in effect, is
3 doing -- or believes that it has the ability to do under this
4 regulation.

5 FEMA can say to the State of the California:
6 California, if you don't pursue a negligence claim against
7 PG&E, we, FEMA, will assume that if California had pursued a
8 claim against PG&E, California would have won. And in our
9 view, that would make California liable to FEMA and subject to
10 a clawback claim to the tune of 2.4 billion dollars. This is
11 the proverbial second bite at the apple, or the Congressional
12 end-around, if you will.

13 THE COURT: Right.

14 MR. GOODMAN: Here's why this doesn't work. First
15 point: Cal OES does not have any direct claims against PG&E.
16 Cal OES is stuck with the same legal framework as FEMA. In
17 fact, the free-public-services doctrine is probably more well
18 developed in the State of California than in any other state.

19 So again, Cal OES, just like FEMA, is stuck with a
20 statute that would specifically give it -- or a government
21 entity -- the ability to recover.

22 So we ask -- the other, of course, exception would be
23 that if there was damage to property owned by Cal OES.

24 THE COURT: But which isn't our case. But that --

25 MR. GOODMAN: Which is not the case.

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1 THE COURT: -- that takes you back to the Health and
2 Safety Code, right?

3 MR. GOODMAN: Right.

4 THE COURT: Okay.

5 MR. GOODMAN: So again, we asked Cal OES: does your
6 claim include any damage to property owned by Cal OES? The
7 answer is no.

8 The next question is: did Cal OES perform any of the
9 services referenced in the statutory exceptions to the free-
10 public-services doctrine? Again, the answer to that question
11 is no.

12 In our view, that ends the inquiry. And we have, I
13 think, another narrow question to submit to the Court, which is
14 this: is a funding party -- so Cal OES isn't CAL FIRE. CAL
15 FIRE was out performing the fire suppression costs. Cal OES
16 didn't perform those services. It was part of a funding
17 pipeline. It wasn't even using its own money, for the most
18 part. It was the party through whom monies flowed.

19 Does that party or a party who is just simply part of
20 the funding mechanism have a direct claim under these statutes?
21 And our position is no, that can't be the case; because if it
22 were, every agency standing in the pipeline would have a
23 duplicative claim against PG&E. And again, we just don't think
24 that that makes sense.

25 THE COURT: But what happens if I -- well, am I

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1 correct, if I sustain your objection to FEMA, I believe you
2 believe that I should therefore sustain at least the same
3 dollar amount -- I mean, not the same dollar amount -- all the
4 Cal OES claim that is the so-called pass-through. But if FEMA
5 takes it out on Cal OES in the future, that's their problem.

6 MR. GOODMAN: Well --

7 THE COURT: I mean, I don't know whether they will or
8 not. But the point is, under this regulation that you
9 described, that's not -- am I right -- that's not a matter for
10 the bankruptcy court to be concerned about?

11 MR. GOODMAN: Well, here's a point I want to flag for
12 you. If Cal OES's claims against PG&E fail, because the Court
13 is unwilling to interpret the California statutes in question
14 as giving a funding party a direct claim -- so you rule against
15 Cal OES -- FEMA would no longer have a claim against the State
16 of California.

17 And let me say that again. If Cal OES's claims
18 against PG&E fail, that then means that FEMA would have no
19 claim against Cal OES under Section 312 of the Stafford Act.

20 THE COURT: But that's -- why is that for me to say?

21 MR. GOODMAN: Well, I --

22 THE COURT: It may be a consequence.

23 MR. GOODMAN: Correct.

24 THE COURT: But it's not -- there's no -- I haven't
25 been asked to decide a dispute between FEMA and Cal OES.

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1 MR. GOODMAN: You have not. But I would submit that
2 the consequence of Cal OES coming in, proceeding under the
3 regulation, and asserting the claims that it has asserted, is
4 that if those claims against PG&E which are before you are
5 denied as not having any statutory basis, Cal OES will have
6 checked the box; it will have done its duty; it will have
7 pursued the claims; it didn't win. Right?

8 THE COURT: But again, am I to be concerned about
9 that? In other words --

10 MR. GOODMAN: Not necessarily. But I think that --
11 again, it's one of those things where -- a lot of times in
12 bankruptcy court there's discussions that -- like to sort of
13 make the court understand the context. Because again, Cal OES
14 is here for the first time.

15 THE COURT: I think I understand the context.

16 MR. GOODMAN: Okay. Very good.

17 Cal OES, again, is like FEMA, here for the first time.
18 Normally --

19 THE COURT: But the one thing I don't know that I'm
20 supposed to do is interpret a FEMA regulation that's directed
21 at Cal OES.

22 MR. GOODMAN: I don't know that you need to.

23 THE COURT: I don't. If I am persuaded as a matter of
24 law that FEMA doesn't have a claim, I think it follows that Cal
25 OES can't have the same -- the same dollar claim has to fail

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1 from Cal OES, but perhaps for a different reason, because it's
2 a pass-through. And how can you be liable for something that
3 you don't -- that the claimant has no right to in the first
4 place?

5 MR. GOODMAN: Correct. But I guess the argument that
6 I'm heading off is I think you're going to hear from other
7 parties that they disagree with that.

8 THE COURT: Okay.

9 MR. GOODMAN: So their position is going to be: no,
10 no, no, no, no; Cal OES would still have this claim even if the
11 FEMA claim fails.

12 And my point is simply this; if you were to take that
13 position, I still think that you would end up ruling that the
14 Cal OES claim is disallowed, because the statutes that they're
15 invoking -- just like FEMA's trying to rely on 317, 13009 of
16 the California Health and Safety Code doesn't help Cal OES
17 either.

18 THE COURT: That's what I'm going to ask them about.
19 And therefore -- well, therefore that would appear to gut the
20 big chunk of the Cal OES claim, if the legal argument is sound.

21 What about the 390 million -- or 329 -- I'm not sure
22 where that falls out. Is that still subject to your challenge
23 under the Health and Safety Code?

24 MR. GOODMAN: Yes. It would, because again, the 390
25 million, even though that would be Cal OES's money that they're

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1 putting into the funding pipeline, we don't believe that they
2 would have a direct claim against PG&E --

3 THE COURT: Because under 3008, that's a liability to
4 the owner of the neighboring property, and that's not the case
5 here. And this is a narrow indication of what can be collected
6 by somebody under 3009.

7 MR. GOODMAN: Right, it's just -- the issue then
8 becomes does 13009 provide Cal OES with a claim when it didn't
9 provide any of the services --

10 THE COURT: Right.

11 MR. GOODMAN: -- set forth in the statute.

12 THE COURT: And so the --

13 MR. GOODMAN: The answer to that is no.

14 THE COURT: Yeah.

15 MR. GOODMAN: I think the entire claim gets flushed.

16 THE COURT: Okay, but for two different reasons.

17 MR. GOODMAN: Yes.

18 THE COURT: All right. But and Cal OES can make the
19 argument -- and I'll make a decision one way or the other --
20 but I don't -- again, I'm not sure that I can make the next
21 leap and say, and by the way, Cal OES has no claim -- no
22 liability to FEMA. I don't know that there's any authority to
23 make that -- or jurisdiction to -- it may be the consequence.

24 MR. GOODMAN: Correct. I'll reserve the rest of my
25 time for rebuttal, Your Honor.

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1 THE COURT: Okay.

2 And Cal OES -- oh, Mr. Zumbro, sure.

3 MR. ZUMBRO: Thank you, Your Honor. Paul Zumbro for
4 the debtors.

5 Similar to the FEMA claims, the debtors agree with the
6 TCC that the Cal OES claims must be disallowed as a matter of
7 law. The applicable law here is the free-services doctrine --

8 THE COURT: Right.

9 MR. ZUMBRO: -- the free-services doctrine, which
10 holds that governmental entities like Cal OES may not recover
11 emergency-response costs absent a specific authority allowing
12 for the cost -- the recovery of such costs.

13 That has deep roots both in California as well as
14 Ninth Circuit case law. Your Honor referenced the Flagstaff
15 case earlier, which is a Ninth Circuit case that holds that --
16 and I'm quoting -- "the cost of public services for protection
17 from fire or safety hazards is to be borne by the public as a
18 whole, not assessed against the tortfeasor whose negligence
19 creates the need for the assistance."

20 Of course, we're not --

21 THE COURT: Except --

22 MR. ZUMBRO: -- admitting negligence, Your Honor, just
23 to be clear. But the law --

24 THE COURT: Except where a statute creates it.

25 MR. ZUMBRO: Correct. Except --

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1 THE COURT: So then you're back to --

2 MR. ZUMBRO: -- except were statute applies.

3 THE COURT: Okay.

4 MR. ZUMBRO: And so we agree with the TCC that Cal OES
5 is sort of a conduit. All of its costs were conduit costs.
6 They had no boots on the ground.

7 These are different than the CAL FIRE claims, where
8 CAL FIRE is asserting costs for the direct fire suppression
9 costs. Those are different. The Cal OES claims fail because
10 they have no statutory basis under California law.

11 THE COURT: Well, they have -- if I can restate it.
12 To the extent -- the portion of the Cal OES claim that isn't
13 FEMA-related has a statute that doesn't apply, because it
14 doesn't fit Cal OES --

15 MR. ZUMBRO: Correct.

16 THE COURT: -- but may indeed fit some other Cal
17 agency.

18 MR. ZUMBRO: It may fit some other --

19 THE COURT: Like CAL FIRE.

20 MR. ZUMBRO: -- Cal agency, but that's not what we're
21 here for today.

22 THE COURT: But that's not what we're here for today.

23 MR. ZUMBRO: Correct. For today's purposes, we're
24 just focused on the Cal OES claims. Those claims are not
25 recoverable, because they didn't directly incur the costs under

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1 a statute that would allow them to recover.

2 Your Honor asked a question -- I agree with Your Honor
3 that the issue of any claim between PG&E and the State of
4 California is not relevant for today's purposes. The only
5 thing that's really relevant today is whether Cal OES has a
6 cognizable state-law claim against PG&E for the claims it's
7 asserting --

8 THE COURT: Right.

9 MR. ZUMBRO: -- against PG&E.

10 THE COURT: Right, that's -- I mean, if there's a --
11 if there's a theory, I guess -- I'll take this up again with
12 Cal OES's lawyers -- if there's some sort of a fallback theory
13 that of course Cal OES has a claim, because they're on the hook
14 to FEMA, we're back to well, how can you be on the hook to FEMA
15 if FEMA doesn't have a claim in the first place?

16 MR. ZUMBRO: Correct. We don't think FEMA has a
17 claim. And then to the extent -- well, the only basis for
18 FEMA -- FEMA's trying to shoehorn -- as Mr. Goodman noted --
19 it's trying to shoehorn a negligence standard in through a
20 regulation where it can collect through the State of
21 California.

22 We think that's improper, because the State of
23 California needs to have a viable cause of action against PG&E
24 for that claim to work. So it's quite different than the
25 situation in the Hawaii case, the Hurricane Iniki, where the

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1 State of Hawaii had insurance available to it, which was
2 clearly to cover the event. This is quite different, where
3 there is no viable claim against PG&E under the free-public-
4 services doctrine.

5 THE COURT: Right.

6 MR. ZUMBRO: So FEMA's Section 312 claim fails as a
7 matter of law, because Cal OES has no corresponding claim
8 against PG&E, unlike the insurance company that the State of
9 Hawaii had in that case. It's quite a different circumstance.

10 THE COURT: Well, but there's a whole -- the whole
11 question of whether there is subrogation entitlement, in any
12 event. That's another question.

13 MR. ZUMBRO: That's not for today's purposes, and we
14 also don't believe that that's an appropriate way to address
15 this. We think the claims fail.

16 THE COURT: But we go back to, if I make a ruling that
17 the debtors and TCC want and I say sorry, FEMA, you're out of
18 luck under the Stafford argument and your argument, and sorry
19 Cal OES, you're out of luck because there is -- to the extent
20 that your claim is a pass-through to FEMA, FEMA doesn't have a
21 claim; and to the extent that you have claims of your own,
22 you're barred by the factual predicate of the statute --

23 MR. ZUMBRO: Yeah.

24 THE COURT: -- and it seems to me I have to stop at
25 that point. I don't say: and by the way, Cal, you -- this is

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1 a good-news/bad-news joke, because the good news is you have no
2 liability to FEMA. But I don't know that I'm allowed to do
3 that. That's all I'm saying.

4 MR. ZUMBRO: We're not asking you to.

5 THE COURT: Okay.

6 MR. ZUMBRO: I don't think you need to either. I
7 mean, for bankruptcy purposes, what we're trying to address
8 today is what are the claims against the estate. We don't
9 think that -- the fact that FEMA seems to be putting pressure
10 on California to bring these claims is irrelevant from our
11 purposes. We care about whether Cal OES has viable claims
12 against us, which they don't.

13 That background is important for context, as Mr.
14 Goodman referenced, but it doesn't go to the legal-liability
15 question that Your Honor needs to decide.

16 THE COURT: Okay.

17 MR. ZUMBRO: I would also note, as I think Your Honor
18 alluded to, the overhang of this sort of some 6.6 billion
19 dollars of these claims is putting a great deal of pressure on
20 the case because of the complex and intricate settlement
21 framework that has gone into place.

22 I do think the time is now to remove that overhang and
23 disallow the FEMA claims and the Cal OES claims, so that going
24 forward we can, for example, have a more productive mediation
25 or otherwise mechanism for dealing with the underlying

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1 California state agencies, the non-OES claims.

2 THE COURT: Well, yeah, but from my point of view, I
3 have to decide things that are presented to me, and I don't
4 ignore letters from fire survivors, but I don't -- I can't
5 really act on them. But I read the newspaper, and I read the
6 papers, and I read over and over and over again, this thirteen-
7 and-a-half-billion-dollar fund has been undermined by more than
8 half because of two governmental agencies.

9 And I'm going, you know, if that's true, there are --
10 that's true; but it's -- the numbers are horribly distorted.
11 But then I say, well, okay, but if the two agencies together
12 really aren't owed seven, they're owed four-and-a-half -- I'm
13 not making light of the losses here -- but it's two-and-a-half
14 billion dollars less pressure on the money for the survivors.

15 And if it's just a question of doesn't anybody
16 understand that, and why don't they understand that, sure, I
17 might make a ruling at some point. But rulings are rulings;
18 and rulings get appealed; and rulings get questioned. And at
19 least the public perception seems to be: why is this -- why is
20 this overinflated? I don't know what the answer is. It's
21 frustrating, from my point of view. But nothing I can do about
22 it.

23 MR. ZUMBRO: Well, Your Honor, from our perspective,
24 the thirteen-and-a-half billion is meant to go to the fire
25 victims themselves -- the individual fire victims. We don't

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1 think it should be two-and-a-half or four-and-a-half billion.

2 THE COURT: Well, I understand. But that --

3 MR. ZUMBRO: We think it's zero.

4 THE COURT: -- but that gets back to the legal
5 question. And if you're right, you're right. And that's true.

6 But if I reach the conclusion that either or both of
7 these agencies have a claim, at least that's my decision,
8 subject to whatever further review there would be, it's still
9 something people have to deal with right now.

10 MR. ZUMBRO: Correct. But I think this is one of the
11 unique places where the legal decision and the practical and
12 the moral decision or the right -- are the same thing.

13 The legal decision is to disallow these claims.

14 THE COURT: Right.

15 MR. ZUMBRO: And the practical consequences of that is
16 to leave the 13.5 billion dollars.

17 I understand that that can't be the basis of your
18 decision. But the legal decision that you do have to make,
19 which is an easy decision, because the claims are not valid on
20 their face, is to cut them out to zero, and then we don't have
21 to deal with the practical question.

22 THE COURT: Well, that's a good argument for an
23 advocate. And if you persuade me, then you'll have me in your
24 camp. But the other side maybe doesn't agree with that. And
25 we know what Mr. Tye thinks.

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1 Let's hear from Cal OES's counsel, now.

2 MR. ZUMBRO: Thank you, sir.

3 THE COURT: I didn't know if I'd see you today, Mr.
4 Pascuzzi, or someone else.

5 MR. PASCUZZI: Well --

6 THE COURT: You got the watch?

7 MR. PASCUZZI: -- you're going to see me, but not for
8 long, Your Honor. Paul Pascuzzi, Felderstein Fitzgerald
9 Willoughby Pascuzzi & Rios, co-counsel with the Attorney
10 General's Office.

11 Mr. Matt Heyn, from the Attorney General's --

12 THE COURT: Okay.

13 MR. PASCUZZI: -- Office, will be arguing it, Your
14 Honor, for Cal OES. Thank you.

15 THE COURT: Okay. I expected to see Mr. Heyn. Are
16 you here, Mr. Heyn? Good morning.

17 MR. HEYN: Good morning, Your Honor.

18 THE COURT: Okay, under the -- under the rules, you've
19 got thirty minutes. And I don't have any specific questions to
20 you other than -- well, other than do you agree that this
21 overlap applies to some extent, no matter what; is that a fair
22 statement?

23 MR. HEYN: It is a fair statement that all but about
24 290 million in the Cal OES proofs of claim, represent FEMA
25 dollars. And if we were to -- the claim were to be allowed, we

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1 would pay those -- all but 290 million dollars back to FEMA,
2 under the regulation.

3 THE COURT: But what if -- what if I sustain the
4 objection to the FEMA claim; what's Cal OES's -- what's the
5 impact on Cal OES?

6 MR. HEYN: If you sustain the FEMA objection, then
7 FEMA's going to rely even more heavily on Cal OES to assert its
8 rights to recover everything that it's legally entitled to.

9 THE COURT: Well, okay. But what I'm getting at is
10 that if I -- if I sustain the objection vis-a-vis FEMA, and
11 that that, for my purposes and perhaps the public's purposes,
12 I've just thrown out a 3.9-billion-dollar claim -- again,
13 leaving aside FEMA's right to take appeals, et cetera, but just
14 focusing on the impact, at the trial level, if I -- if I then
15 say and Cal OES's pass-through claim fails for the same reason,
16 that's as far as I can go on that issue, I believe, right? And
17 if FEMA has a quarrel with OES, that's for another day.

18 MR. HEYN: Well, to be clear, FEMA has two sets of
19 rights that are relevant for the hearing today. One is their
20 right directly against PG&E --

21 THE COURT: Right.

22 MR. HEYN: -- under the theories they've asserted in
23 their proof of claim. Another set of rights is the rights they
24 have against us.

25 THE COURT: Right.

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1 MR. HEYN: Their expectation that Cal OES do
2 everything commercially reasonable to prosecute its causes of
3 action.

4 And Cal OES's claims do not include anything based on
5 the FEMA statute. Cal OES's claims are sound purely in
6 California law. And so the question Your Honor has today is
7 given that Cal OES funded all these amounts -- and I don't
8 disagree with the assertion that we don't have the boots on the
9 ground putting out fires -- given that we fund all these
10 claims, given that we task other agencies and call other state
11 agencies in to help out with the fires and are responsible to
12 pay those state agencies back, do we have a claim under
13 California law, right?

14 And before -- I'm going to launch into that, but
15 before I do, I just want to make clear, the Office of Emergency
16 Services is staffed with committed civil servants whose mission
17 it is to help survivors from disasters. At the outset it's
18 really important to kind of correct a statement that's made in
19 the reply brief.

20 I'm reading from page 6 of the TCC's reply brief:
21 "Cal OES is wrong or does not want to admit that it is trying
22 to take money from victims. Cal OES does not owe any
23 reimbursement under Section 312(c)'s plain language."

24 This is fundamentally incorrect for two important
25 reasons. First is that Cal OES doesn't have the liberty to

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1 fail to assert claims. The TCC makes a lot of novel arguments
2 in their reply brief about this requirement of FEMA that we
3 pursue commercially reasonable tort claims and say well, it's
4 invalid. There's all the -- reasons X, Y, and Z.

5 But the important part about the novel arguments is
6 they're novel. It's not really something that Cal OES can rely
7 on. In the years at issue, 2015, 2017, 2018, FEMA provided
8 billions to victims, and they provided it by giving it to Cal
9 OES and say use it appropriately. And it said -- as a
10 condition of that aid, it said you're going to need to pursue
11 any valid claims that you have. You have an obligation to go
12 after tortfeasors.

13 If that requirement is invalid, that might be an
14 argument that I make later on, down the line, when FEMA sues
15 me. But it's not really an argument that we can rely on in not
16 asserting proofs of claim or in backing away from the proofs of
17 claim. Cal OES has to pretend that the regulations are valid,
18 at this point, because not doing so is malpractice.

19 As Your Honor is well aware, in the Hawaii v. FEMA
20 case, FEMA really did sue Hawaii for failing to fully pursue
21 its insurance claims. California doesn't need that. And it
22 doesn't need a situation where FEMA de-obligates funds from
23 survivors or fails to fund future disasters.

24 The second area where that statement rubs Cal OES
25 particularly the wrong way is it relies on the false premise

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1 that if Cal OES has an allowed claim it must come from
2 survivors. But that's not something that's necessary about
3 bankruptcy case law and it's not something necessary about this
4 case. That's a construct created by the TCC RSA.

5 THE COURT: Well, but it -- but it's the state of play
6 today; isn't it?

7 MR. HEYN: It is the state of play today.

8 THE COURT: Okay.

9 MR. HEYN: But the important point is, the agencies
10 didn't negotiate that RSA. We weren't present when it was
11 negotiated. The TCC wasn't representing us when it was
12 negotiated. And we object -- we object to the plan structure.
13 We don't think that this is an appropriate plan structure.
14 We've been very clear. We think that the survivors should get
15 paid all of the 13.5 billion, and PG&E needs to find a way to
16 separately pay the government agencies.

17 THE COURT: No, I understand. But again --

18 MR. HEYN: P --

19 THE COURT: -- at the moment, there's nothing pending
20 to deal with that, I understand. And Mr. Pascuzzi has made it
21 clear in the past, there may be motions or challenges on
22 classification --

23 MR. HEYN: Right.

24 THE COURT: -- and we have the whole confirmation
25 issue coming down the road.

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1 MR. HEYN: If PG&E wants to set forth a plan that
2 makes substantial distributions to equity holders, it needs to
3 pay the wildfire survivors in full and pay all of the -- all of
4 the allowable government claims.

5 Right now, I checked this morning, PG&E stock is
6 trading at \$17.33 and market capitalization of about 9.1
7 billion.

8 THE COURT: Well, I wonder what it was two days ago,
9 since we have some other issues going on out there in the real
10 world except for the President. And he says it's not a
11 problem.

12 MR. HEYN: They can find the money to pay all their
13 just claims if they want to pay shareholders.

14 THE COURT: Mr. Heyn I need to go -- I need to go back
15 to understand more specifically what you're -- how to deal with
16 this inter-agency issue. So go ahead and make further
17 arguments that you want, but I'm going to circle back to this
18 question.

19 And I don't want to cut you off, because I do
20 understand that this is important for the fire survivors and
21 for the State of California. So just keep in mind, I'm going
22 to come back to this interplay between the two agencies.

23 MR. HEYN: Sure. Sure.

24 I was going to talk right now about our theories of
25 recovery, because I think that the TCC is right, that there are

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1 essentially a legal -- that these proofs of claim, at this
2 point, boil down to a legal dispute -- a legal dispute under
3 the -- whether the facts we've asserted in the proofs of claim
4 are adequate to support any right of recovery.

5 And what are those facts? PG&E negligently and in
6 violation of law caused the fires. The governor and the
7 President declared a state of emergency. Cal OES, while it
8 didn't have boots on the ground, it tasked other agencies to
9 respond to the fires, including out-of-state agencies. I think
10 we've cited appropriately the EMAC statute which says that
11 we're liable for those out-of-state agencies coming in and
12 providing services.

13 We paid those amounts. And then following the fires
14 we had a debris-removal program that removed substantial
15 amounts of toxic substances. Those are the facts -- and that
16 we got paid a substantial sum from FEMA. Those are the facts.

17 So what are the -- what are the theories of law? I
18 mean, I think our proofs of claim are not a model of clarity.
19 We threw everything in there. But there are -- the opposition
20 to the claim objection has four theories: 13009 for the fire
21 suppression and emergency services; 13009.6 for the cleanup of
22 hazardous substances; we've got the equitable subrogation
23 argument under California law; and we've got the Bankruptcy
24 Code Section 509 argument. So let's deal with those in turn.

25 13009 gives California agencies the right to recover

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1 costs that they incur. So the question is, who incurred the
2 costs? Is it the out-of-state agencies that were covered by
3 Cal OES that Cal OES had an obligation to pay back? Or was it
4 Cal OES that actually paid back those costs when it tasked
5 those agencies to come in?

6 This is not just firefighters, it's all kinds of first
7 responders: people that evacuated survivors; people that
8 provided medical care to survivors. Who incurred those costs?
9 We would say it's clear, Cal OES incurred the costs. It asked
10 these agencies to come in and it was liable to pay them.

11 Even in the absence of asking somebody and being
12 liable to pay them, really the incurred standard here should
13 be: who had to -- who paid them? Right? We're not looking
14 for a double recovery. What we're saying is is that once
15 you're paid, the person that pays really ought to be the one
16 that recovers from the tortfeasor under 13009.

17 THE COURT: But the statute's pretty clear on who can
18 recover, right?

19 MR. HEYN: Right. Whoever incurs the costs. So
20 that's the question: who incurred these costs?

21 THE COURT: Well, incurred it when? Incurred it
22 first, or incurred them second? I mean --

23 MR. HEYN: Well --

24 THE COURT: When those first responders went out
25 there, weren't their employers paying them and then Cal OES is

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1 simply reimbursing them?

2 MR. HEYN: Right. But they were out there at the
3 behest of Cal OES, knowing that Cal OES would pay them. So are
4 they incurring the costs?

5 And let me be clear. I think that either could
6 probably assert these claims. I don't think there could be a
7 double recovery, but I think you'd have to be clear about who
8 pay -- and if they did, they wouldn't be allowed to keep the
9 money. Right? Once they've been paid back, they don't get to
10 also recover from PG&E. That would be a double recovery.

11 What we're seeking -- what we're seeking here is a
12 single recovery. What we're seeking here is saying the party
13 that's out the money gets the money back.

14 THE COURT: So we're back to the question that I asked
15 you before, is it -- is it the 290 million or is it the
16 billions?

17 MR. HEYN: Well, what I would --

18 THE COURT: If I buy your argument and say you win,
19 how much do you win? Do you win 290 million or do you win 2.4
20 billion.

21 MR. HEYN: Everything that we're liable to pay,
22 subject to the duty to pass it along to FEMA to the --

23 THE COURT: Well --

24 MR. HEYN: -- to the extent it represent their money.

25 THE COURT: Well, but paying -- but paying the

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1 agencies that you called upon to provide service is different
2 from paying back to FEMA; isn't it?

3 MR. HEYN: Yeah. No, no, so --

4 THE COURT: Yeah?

5 MR. HEYN: -- as an initial matter, we paid the
6 agencies and we paid the first responders on the ground.

7 THE COURT: So let's just stop right there.

8 MR. HEYN: Sure.

9 THE COURT: So maybe it was a fire department or a
10 recovery -- some disaster agency in another state, and they
11 answered your call, they went in there, and they did their
12 thing, and now Cal OES has paid them --

13 MR. HEYN: Right.

14 THE COURT: -- and you want to be paid for that.
15 Okay?

16 MR. HEYN: Correct.

17 THE COURT: And that then is the 290-million-dollar
18 aggregate, no?

19 MR. HEYN: No. No. The amount that we -- the amount
20 that we incur is the full amount that we had to pay, because we
21 are the --

22 THE COURT: Which is the full amount of your claim?

23 MR. HEYN: Right.

24 THE COURT: I know, but --

25 MR. HEYN: We don't get to keep it. We have to --

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1 THE COURT: I know you don't get to keep it, but
2 you -- all right, never mind. Go ahead.

3 MR. HEYN: I mean, the simpler way to think of this,
4 perhaps, is to think about what if there were a car accident.
5 The victim of a car accident, even though they were paid from
6 their insurance for a lot of their damages, would still have a
7 claim in the full amount of the -- to the extent that they were
8 damaged by the tortfeasor, right?

9 THE COURT: By the defendant, yes.

10 MR. HEYN: But they would have an obligation to pay
11 the insurance company back or the insurance company could
12 directly assert the claim for the amount it's out.

13 THE COURT: Well, but that's the very common, very
14 normal subrogation concepts.

15 MR. HEYN: Correct.

16 THE COURT: Okay.

17 MR. HEYN: And all I'm saying is there's no reason
18 that it shouldn't apply in this circumstance. In fact, we've
19 asserted subrogation claims.

20 So I mean, let's move on to 13009.6. It broadly
21 provides that the costs of toxic cleanup are charged under --
22 that's under subdivision (a). And it says -- who can collect
23 the charge? Well, it says any participating agency. So the
24 question is did Cal OES participate? Well, the cleanup program
25 is Cal OES' cleanup program. It mans that program. It made

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1 sure that the soil samples were taken. It didn't directly do
2 it, but it paid for all this work to be done, and it went out
3 and directed that the work be done.

4 I would say that under those facts we clearly
5 participated in the cleanup program, and so we clearly have a
6 right under 13009.6, which leads us to subrogation, both
7 equitable and statutory.

8 The principle is basic. Under principle of equity, if
9 you harm somebody, and somebody else is required to pay for
10 that harm, the debt doesn't vanish like smoke in the breeze.
11 You still have an obligation to pay back the loss. You just
12 pay it to a different person. In this case, PG&E harmed
13 several cities by destroying their infrastructure. In this
14 case it harmed a lot of individual wildfire victims by
15 destroying their homes and leaving a mess, candidly. A toxic
16 mess.

17 Cal OES went in, and it funded a lot of the
18 rebuilding. Cal OES went in and it funded the cleanup. Does
19 PG&E get to fully escape liability just because Cal OES is
20 required to clean up the mess? We would say no. We hit all --

21 THE COURT: Well, the answer is you don't get it if
22 the free-service doctrine applies unless you have a statute,
23 and then that gets back to the 13009.6, and then that's -- it's
24 just how the statute reads, doesn't it?

25 MR. HEYN: It's an excellent point. So I --

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1 THE COURT: Well, but isn't -- isn't it -- but --

2 MR. HEYN: Well --

3 THE COURT: But doesn't that answer the question?

4 MR. HEYN: No, I don't think so.

5 THE COURT: Okay.

6 MR. HEYN: Because the free-public-service doctrine is
7 different from the concept of equitable subrogation. The free-
8 public-service doctrine says that the state, in its role of
9 doing the things that a state does, doesn't have a separate
10 cause of action for putting out fires, providing for public
11 safety. Equitable subrogation says who has a claim and who can
12 step into the shoes of it?

13 It's separate to say well, Cal OES is asserting
14 because it's out all this money from having to pay victims.
15 But it's a separate thing to say look, all these victims had
16 great proofs of claim, and we took care of them, and we want to
17 bring the proof of claim on our own behalf, or as a subrogee.

18 So if you think about the U.S. Supreme Court case that
19 they cited, right, you've got the serviceman. This is United
20 States v. Standard Oil. Standard Oil hits a serviceman. And
21 it goes to the Supreme Court, and the Supreme Court has to
22 really address two questions. Can the military cover for the
23 pay that it paid this victim? And the Supreme Court says no.
24 It's a free-public service. You had to pay that already. You
25 need a statute.

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1 But it also, in a footnote, addressed well, can the
2 army step into the shoes of the soldier and bring claims that
3 the soldier might bring? And in a footnote they say nope, that
4 doesn't work. And it doesn't work because the soldier already
5 settled its claim.

6 Now, if the free-public-service doctrine encompassed
7 the concept of subrogation, you really couldn't have that,
8 right? You wouldn't need to go into well, there's a separate
9 theory under which this army can recover for stepping into the
10 shoes of the victim, because it would all be encompassed in the
11 free-public-service doctrine.

12 And in particular, I point Your Honor to the case we
13 cited from the restatement, the Ford v. United States. That
14 was a case in which, again, the army paid a victim based on
15 theft by a soldier, and the army pursued a claim against the
16 soldier directly, saying we paid this victim. Now we're going
17 to take the money from you, because you owed this money to the
18 victim. That's a pretty similar context to what's going on
19 here.

20 We paid for PG&E's loss. We covered -- or we paid for
21 some of PG&E's damages. We step into the shoes for the damages
22 we paid for.

23 THE COURT: Okay. I --

24 MR. HEYN: There are --

25 THE COURT: Well, go ahead. You wanted to make your

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1 509 argument too, I guess, right?

2 MR. HEYN: Well, I think the 509 speaks for itself.

3 Either we meet the standards of 509 or we don't.

4 THE COURT: But don't you -- if your 509 controls,
5 don't you have to wait until the victims are paid in full?

6 MR. HEYN: Well, that's the hope of this --

7 THE COURT: But full might not be a negotiated number
8 or the RSA number. It might be the literal term in full. I
9 don't know. I'm not sure. I don't know. Why wouldn't it be
10 the latter, regardless of what the negotiated RSA amount is?

11 MR. HEYN: Well, on the theory that Your Honor has a
12 lot to decide today, I can deal with the 509 issue very
13 briefly.

14 There's nothing in the record to suggest that the
15 victims won't get paid in full.

16 THE COURT: Well, that may be true.

17 MR. HEYN: Or can't get paid in full.

18 THE COURT: But the point is, if I buy your other
19 arguments, then you don't need 509. If I --

20 MR. HEYN: Right.

21 THE COURT: If I believe that 509 is your only hope,
22 you're going to be -- I don't think you get an assurance that
23 you get reimbursed just when the -- well, I don't know what
24 happens, because if the 13.5 isn't enough in fact, then you're
25 out of luck.

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1 MR. HEYN: Well, I think the appropriate scenario in a
2 509 world would be to subordinate Cal OES' proof of claim, and
3 then Cal OES is in its own class, and it can decide whether
4 it's appropriate for this 13.5 billion dollars to short victims
5 and to not pay us, with all this money going to shareholders.

6 THE COURT: Well, at the moment -- well, that may be
7 an option, but at the moment you're not in a separate class.

8 MR. HEYN: Well, I think that Your Honor should decide
9 the claims based on the law, and then we'll let the plan
10 implications fall out where they may.

11 THE COURT: Yeah. I agree. I mean, that's all I can
12 do. I mean, I can't --

13 MR. HEYN: Yes.

14 THE COURT: I can't sit here and say you win because
15 the plan's going to be changed. I have to say you win or you
16 lose, and then which --

17 MR. HEYN: Based on the legal merits.

18 THE COURT: Okay. So I want to go back to the
19 interplay between the two entities, because I'm still --

20 MR. HEYN: Sure

21 THE COURT: I'm still missing something. So let's
22 contrast the fire department from Las Vegas and FEMA. So the
23 fire occurs in Santa Rosa, and Cal OES calls out for help, and
24 the fire department from Las Vegas comes up, and the guys on
25 the trucks help solve the problem, and Las Vegas City Fire

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1 Department sends Cal OES a bill, and you pay it. And now that
2 amount that you've paid to that first responder, or that
3 entity, is part of your claim.

4 But you've also gotten money from FEMA.

5 MR. HEYN: Correct.

6 THE COURT: Are they the same? Is the claim -- is Cal
7 OES' role vis-à-vis this third-party vendor -- I mean first
8 responder -- legally the same as what FEMA is asking you to
9 pay?

10 MR. HEYN: What I'm struggling with is legally the
11 same. What I would say is that this Las Vegas first
12 responder --

13 THE COURT: Well, I just picked that. It could have
14 been --

15 MR. HEYN: Yeah, yeah. No, no.

16 THE COURT: -- Oakland.

17 MR. HEYN: Yes.

18 THE COURT: It doesn't really matter. I intentionally
19 made it out-of-state because you referred to that. But it
20 doesn't matter. It could be Oakland.

21 MR. HEYN: Right.

22 THE COURT: I just -- I don't know whether you would
23 argue that they are the same or different. And I need to know
24 whether --

25 MR. HEYN: Our relationship to the --

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1 THE COURT: -- whether --

2 MR. HEYN: Sorry.

3 THE COURT: No, you go ahead.

4 MR. HEYN: Our relationship to the fire department in
5 Oakland is different than the relationship of FEMA to the fire
6 department in Oakland.

7 THE COURT: Right. FEMA sent you a lot of money, and
8 Oakland sent you a firefighter.

9 MR. HEYN: Right.

10 THE COURT: Okay. But that --

11 MR. HEYN: I'm just really struggling to track what
12 you're --

13 THE COURT: I'm trying to figure out this role. Then
14 I'll ask the question differently. If what -- you heard the
15 TCC argument about FEMA, if I accept that argument, and I say
16 FEMA has no claim in this bankruptcy --

17 MR. HEYN: Right.

18 THE COURT: -- for whatever reason, I'm still not
19 clear what happens to your reimbursement obligation in terms of
20 whether you have a claim in this case.

21 Now, the -- or the TCC -- most creditors -- and Mr.
22 Zumbro said it too. You don't have any -- you're not likely to
23 have a claim that you owe to FEMA. But is that true or not?
24 What do I do about that?

25 MR. HEYN: Well, I mean, I think that we have an

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1 obligation to be commercially reasonable in pursuing claims.

2 THE COURT: Well, you filed a proof of claim, and
3 you're defending it.

4 MR. HEYN: I think I've been eminently reasonable.

5 UNIDENTIFIED SPEAKER: So sit there with it.

6 THE COURT: No, but look. I don't have any doubt
7 about that. My question is when I'm sitting here working
8 through it in the context of two substantial claims, I
9 understand the consequences and what the law -- or I have to
10 conclude what the law says that I do vis-à-vis FEMA. And in
11 some respects, if I accept FEMA's argument, then maybe what
12 happens with Cal OES goes away, to some extent.

13 But if I say sorry, FEMA. For all the reasons we
14 heard this morning you don't have a claim at all, I still, Mr.
15 Heyn, am having trouble knowing what is the impact on the
16 portion of Cal OES' claim that is the so-called pass-through to
17 FEMA. I don't have a problem with analyzing what about the
18 Oakland firefighter. You're going to win it or lose it based
19 upon some other legal principles that you've described.

20 MR. HEYN: Right.

21 THE COURT: So help me know what is the legal
22 consequence of the -- for convenience, we're calling the 2.4
23 billion dollar FEMA portion of the Cal OES claim.

24 MR. HEYN: Right. Right. And so what you would say
25 is sorry, FEMA. You don't have a claim against PG&E. But as

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1 you said earlier, you really are not in a position to say FEMA,
2 you don't have a claim against Cal OES, right?

3 THE COURT: Correct. I don't think so. You'd like me
4 to say that.

5 MR. HEYN: I would love it.

6 THE COURT: You'd like me to, but I don't --

7 MR. HEYN: I would stipulate to it.

8 THE COURT: I don't believe I have the right to do
9 that.

10 MR. HEYN: So --

11 THE COURT: So --

12 MR. HEYN: If FEMA doesn't have a claim against PG&E,
13 it can only assert its claims against Cal OES, and it's --

14 THE COURT: But what do we do with the portion of your
15 claim --

16 MR. HEYN: Right.

17 THE COURT: -- that's the FEMA portion? I think it
18 has to be disallowed, but you've got to tell me why I'm wrong,
19 unless you -- I mean, I know you'd like me to disallow it and
20 like me to say you're off the hook, but that's not the point.

21 What if FEMA shows up, stands up today and says we
22 just heard from the president and we're withdrawing our claim?
23 What do I do with your claim?

24 MR. HEYN: My claim is still allowed on the merits,
25 right? And so the only merits argument there is on this, I

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1 think, is well, Cal OES doesn't have a claim under the statutes
2 or under subrogation, because it's not out-of-pocket. That, I
3 think, gets to what troubles you. I hope it is. I don't want
4 to talk about three different things.

5 THE COURT: Well, I mean, this isn't something any of
6 us do every day. Maybe you do, but the rest of us don't. So
7 the whole thing troubles me. But I'm trying to figure it out.
8 So I don't -- I'll try a different hypothetical.

9 So Mr. Julian's a capable lawyer, and he likes to win,
10 and when good lawyers win, they love it when the judge says
11 prepare your order. So if I announce that FEMA loses. Mr.
12 Julian, prepare the order and work with Mr. Heyn to make the
13 order. What would the order say about your claim? Would it
14 say your claim is reduced by 2.4 billion because FEMA has no
15 claim?

16 MR. HEYN: I'd love for it to say that, but I don't
17 think it --

18 THE COURT: But what would it -- as an officer of the
19 court, what would you concede that it has to say?

20 MR. HEYN: I think it has to say that FEMA's claim is
21 disallowed, and to the extent Your Honor thinks that we don't
22 have a legally valid right of recovery against PG&E, then you
23 have to disallow our claim in a certain amount.

24 THE COURT: Okay.

25 MR. HEYN: But the point is that the legal validity of

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our claim doesn't have anything to do with the legal validity of FEMA's claim.

THE COURT: Well, but if that were true, this would be easy, I guess, but I have no trouble looking at the Health and Safety Code and reading your arguments about the so-called pass-through. Do you get a claim because you've paid the Oakland Fire Department, or is that your problem? But I don't know what the legal consequences are of whether Cal OES has an allowed claim for its so-called pass-through obligation to FEMA when FEMA, based upon my theoretical ruling, doesn't have a claim.

And listen. I don't have -- if there isn't an easy answer, I don't want to put you on the spot, where as an advocate for Cal OES you'd like to have no liability to FEMA, but as a lawyer familiar with the issues, you might have a different take on it.

MR. HEYN: I'm going to take one more try at it.

THE COURT: And Mr. Troy's going to help you too. Yes?

MR. TROY: I was just -- I was going to -- Matthew Troy, Your Honor, Civil Division, on behalf of FEMA. I think Your Honor needs to focus on Section 312.

THE COURT: Okay.

MR. TROY: That's why Cal OES is filing these claims.

THE COURT: Right.

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1 MR. TROY: 312 is not dependent upon 317. 317 is not
2 dependent on 312.

3 THE COURT: Okay.

4 MR. TROY: 317 is FEMA's direct cause of action
5 against PG&E in this case.

6 Let me pose it another way, a hypothetical. I think
7 you came pretty close to it with your President Trump tells me
8 to withdraw the claim. If only. I was going to come up with
9 the hypothetical, what if FEMA just never filed a claim in the
10 first place --

11 THE COURT: Well, the same thing.

12 MR. TROY: -- which is what everybody here wants. Or
13 wanted.

14 THE COURT: Well, the same result. It would be --
15 you'd be barred.

16 MR. TROY: Cal OES and Mr. Heyn would still be filing
17 a proof of claim, because they have a liability under 312.

18 THE COURT: Okay.

19 MR. TROY: And if -- I can --

20 THE COURT: FEMA --

21 MR. TROY: I don't know for sure.

22 THE COURT: So --

23 MR. TROY: But I would submit it would not be
24 commercially reasonable to neglect to prepare and file a proof
25 of claim to recover disaster assistance from another source.

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1 THE COURT: Okay. But then the question is, is PG&E
2 another source as the statute reads?

3 MR. TROY: Yes.

4 THE COURT: And but there's different --

5 MR. TROY: The Hawaii case makes that clear, and other
6 cases make that clear. It is broadly interpreted.

7 THE COURT: The Hawaii case has to do with insurance
8 companies, though, right?

9 MR. TROY: Any other source, Your Honor.

10 THE COURT: Well, no.

11 MR. TROY: It doesn't say any other tort -- I mean,
12 that's what 312 says.

13 THE COURT: I understand your point. But the point is
14 I believe the TCC argues that the other source is other folks.
15 It's not the tortfeasor. But that's a point of dispute. Your
16 point, if I got it right, is even if FEMA is out under 317, Cal
17 OES has a right to assert the claim under 312, and the debtor
18 and TCC have a right to oppose it, obviously.

19 MR. TROY: Let me clarify. It has a right to assert a
20 claim for the theories asserted in its proofs of claim here.

21 THE COURT: Yes. Yes.

22 MR. TROY: It doesn't have a right against PG&E by
23 virtue of 312. It is asserting the theories in its proofs of
24 claim against PG&E because of 312.

25 THE COURT: Okay. I got it.

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1 MR. TROY: So 317 and 312 are not in any way dependent
2 upon each other. Let me go back to another of your
3 hypotheticals. I always like to answer your hypotheticals,
4 because I think it makes you happy.

5 The order you give to Mr. Julian and say prepare it,
6 what does it say about Cal OES' claim when I have ruled only,
7 hypothetically, that FEMA is out. The proposed order says
8 nothing about Cal OES' claim. It say absolutely nothing. And
9 if it does, Your Honor, then you're venturing into that
10 territory that I think you've recognized you can't and shan't.
11 You don't have jurisdiction to tell Cal OES that it's off the
12 hook to FEMA.

13 THE COURT: Well, I agree I can't tell Cal OES that
14 it's off the hook to FEMA. But I can tell PG&E it's off the
15 hook to Cal OES. I mean, it's my job to do that. If I'm
16 incorrect, that's why we have appellate courts.

17 MR. TROY: You can on the basis that the theories that
18 Heyn's put forward in the proofs of claim and that he's argued
19 about here today --

20 THE COURT: Yes.

21 MR. TROY: You determine are not not legally viable.

22 THE COURT: Correct.

23 MR. TROY: But not on the basis that oh, FEMA doesn't
24 have a direct claim under 317. That cannot be the basis for
25 disallowing Cal OES' claim.

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1 THE COURT: Okay. I got you.

2 MR. TROY: Thank you.

3 THE COURT: All right. Mr. Heyn, do you want to make
4 any final comments? I think I'm ready to put this to bed. I'm
5 not going to make a ruling this moment. Do you want to make
6 any further argument?

7 MR. HEYN: Let me just address a couple of points made
8 in the opposition about the subrogation issue. There are five,
9 I think. First, there's this argument that Cal OES used the
10 wrong form. If we have a --

11 THE COURT: That's not a --

12 UNIDENTIFIED SPEAKER: All right.

13 THE COURT: That's not going to drive the bus.

14 MR. HEYN: Second is that there's this free-public-
15 service doctrine. And as I said, it doesn't really cover
16 subrogation. Free-public-service says the state doesn't have a
17 claim in its own right. Subrogation is we step into the rights
18 of others once we pay their claim.

19 They say Section 509 doesn't have an explicit
20 exception to the free-public-service doctrine. That's not what
21 the free-public-service doctrine is. The free-public-service
22 doctrine says if there's a statute, and you recover under the
23 statute, you can recover.

24 Argument 4 is the injustice to the victims. I think
25 we've talked about that. You allow the claims as they stand,

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1 and we'll figure out the plan confirmation, the structure, at
2 another hearing.

3 THE COURT: Okay.

4 MR. HEYN: And then the fifth argument is we should be
5 somehow disallowed as a fire victim claim but then allowed as a
6 subrogation claim. I think we can deal with a motion to
7 reclassify at a different time. I understand that subrogation
8 attorneys are here to --

9 THE COURT: Well, the subrogation attorneys, they
10 filed a paper that preserves their position, and I understand
11 their point. All I'm deciding from today's hearing is whether
12 your client and FEMA have viable claims in this bankruptcy.
13 That's all I'm deciding today.

14 MR. HEYN: Yes, Your Honor. Thank you.

15 THE COURT: Okay. Thank you very much for your
16 efforts.

17 Closing comments from Mr. Goodman and Mr. Zumbro, and
18 then the matter will be submitted.

19 MR. GOODMAN: Good afternoon. No, I'm sorry. Yes,
20 good afternoon. It's now afternoon.

21 Closing comment. On the subrogation issue I think we
22 would argue one argument and one argument alone, which is that
23 fire suppression costs, the kind of costs that we're talking
24 about, can only be recovered where specifically authorized by
25 statute. Subrogation is just another equitable end-around or

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1 try a way to get around that doctrine. It's an equitable
2 theory. If it worked, it would completely blow apart the free-
3 public-services doctrine in its entirety, because, for example,
4 in the City of Flagstaff decision -- sorry. It says I'm -- the
5 train derailment, I mean, you could get around the free-public-
6 services doctrine just by pointing to someone who benefitted
7 from the cleanup and the services that were provided and say
8 well, ignore the fact that I'm the government. I'm going to
9 step into that person's shoes. It's still an equitable theory.
10 It's still the kind of claim, in its very nature, that is not
11 the specific statutory authorization that the doctrine
12 requires.

13 So again, we think that at the end of the day it all
14 comes down to whether California has a statutory claim against
15 PG&E. And on that point, I would say this.

16 Free California. Free them. If this Court finds that
17 the Cal OES claim fails under California law because of the
18 free-public-services doctrine and because the statutes do not
19 afford California the right to recover from PG&E, thereby
20 knocking out the 2.7-billion-dollar claim in its entirety, and
21 our view is I don't now see -- now again, we wouldn't be asking
22 the Court to rule, but I'm just saying the practical
23 consequence of that is likely that FEMA really can't complain
24 about what Cal OES did. They did their job. They filed their
25 claim.

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1 As Mr. Heyn noted, they threw in the kitchen sink. I
2 mean, they threw in every statute they could think of. I know,
3 because I had to go through each and every one of them and come
4 up with a response as to why they don't apply. They have gone
5 the extra mile here in terms of pursuing a claim that is of
6 first impression.

7 If the Court says thank you, Cal OES, but the statutes
8 don't give you the right to recover, and they give the Las
9 Vegas Fire Department the right to recover, but it doesn't give
10 you the right to recover, a huge cloud in this case is
11 instantly lifted. You said if you handed me a piece of paper
12 and said Mr. Goodman, would you write an order up, what would
13 it say? It would say two things. One, it would say FEMA's
14 claim under Section 317 is out, and it would say two, that Cal
15 OES' claim under the California statutes that it has cited is
16 out as well. Period. It is so ordered.

17 Thank you.

18 THE COURT: Mr. Zumbro, do you need any more?

19 MR. ZUMBRO: Thank you, Your Honor. Paul Zumbro from
20 Cravath, Swaine & Moore on behalf of the debtors.

21 Just to sum up, Your Honor. From the debtors'
22 perspective, the real issue here, which I think the Court has
23 astutely picked up on, is the whipsaw affect of the FEMA
24 claims, both the direct claims brought by FEMA, the 3.9-
25 billion-dollar claim, and the indirect claims that Cal OES has

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1 brought because it believes that the Stafford Act requires it
2 to do so, the 2.4 billion dollars of the 2.7 billion dollars in
3 claims asserted by the Cal OES.

4 Whether the law, in fact, requires Cal OES to assert
5 those claims is not an issue that's before the Court today.
6 What's important for today's purposes is whether the claims
7 asserted by FEMA and Cal OES are valid as a matter of law.

8 Under the Stafford Act, the FEMA claims are not.
9 Under the free-public-services doctrine, the Cal OES claims are
10 not. And just to finish the thought in terms of the colloquy
11 that Your Honor was having with Mr. Heyn and Mr. Troy, I think
12 Mr. Troy's right that they are two separate causes of action.
13 There's the 317 cause of action for FEMA's direct claim, which
14 fails for the reason we talked about earlier today.

15 I think the best way to think about the Cal OES and
16 FEMA relationship is that California has a contingent liability
17 to FEMA for potential duplication of benefits. But that
18 liability is very, very contingent, because unlike the claim
19 against the insurance company in the Hawaii case, the Cal OES
20 has no viable claim against PG&E.

21 So I think Your Honor was asking the right question,
22 are those two claims different, or are they the same? They are
23 different, but I think they both fail, because neither of them
24 has the underlying validity of a legal claim.

25 So I think they both fail together. Mr. Troy's right

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1 that they're separate claims. I think Mr. Goodman's right that
2 the order has to say they're both disallowed in full.

3 THE COURT: Okay.

4 MR. ZUMBRO: Thank you, sir.

5 THE COURT: Thank you, everyone for the spirited
6 debate and well-briefed issues. I will take the matter under
7 advisement, do my best as quickly as I can. And I'm not going
8 to go past 12:30.

9 Mr. Karotkin, are you going to speak to the question
10 on the claim thing, or is Mr. Slack? Who's going to -- are we
11 going to resolve it quickly or not? What do you want to do on
12 that? And if you're on duty for this I -- I assume you were.
13 What would you like me to do?

14 MR. KAROTKIN: First, for the record, Stephen
15 Karotkin, Weil, Gotshal & Manges, for the debtors. We received
16 this morning from counsel for the putative class --

17 THE COURT: The plaintiffs. Yes.

18 MR. KAROTKIN: From, I guess, the Lowenstein firm and
19 from the Michelson Law Group, proposed revisions to the notice
20 and order.

21 THE COURT: And I got it, and I got yours. I just
22 haven't had a chance to read them.

23 MR. KAROTKIN: Yes. I don't think there are many
24 issues that we should have problems with, either of us. I
25 think there's some clarification language. I think there's a

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1 couple of substantive items that they've raised that we don't
2 think are appropriate, namely postmarked as opposed to claims
3 being actually received, language that we included that they
4 struck as to no need to file a proof of claim solely on account
5 of equity interest, which is a very, very standard provision in
6 any notice of a bar date.

7 We think that they've added language to be able to
8 file claims electronically, which -- not electronically, but by
9 email -- which we don't think is appropriate, because they
10 could email it to anybody. And we'd just like to clarify with
11 them -- they severely or significantly limited the number of
12 CUSIP numbers, and we would just -- if that's the basis for
13 what they've asserted in the class claim, and it's accurate,
14 we're fine with that. But I think, perhaps, if we could spend
15 some time with them and try to resolve these issues, that may
16 be the best way to proceed.

17 THE COURT: Well, that's encouraging.

18 Ms. Michelson, I see you here. Are you covering for
19 this today or is someone else? I'll just make a brief
20 statement. I'll tell you what seems important to me, but are
21 you on duty today?

22 MS. MICHELSON: I am here, Your Honor, but my
23 colleague Mickey Etkin and also Nicole Zeiss are on the line
24 and are prepared to argue any issues.

25 THE COURT: Okay. I'm not ready. I don't want to

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1 take the argument today.

2 So, Mr. Etkin, you don't need to state your
3 appearance. As long as you're here on the line. Here's my
4 thinking on the subject. I want to explain one thing that may
5 be obvious, but the reason why it was important to me to put
6 more information in the stuff about it -- in the opening part
7 of the notice -- was because I worried about people who were
8 getting their very first notice of not having a context. Like,
9 why am I getting this proof of claim, and what am I supposed to
10 make of it? And so neither of you, apparently, had a problem
11 with what I added in there, a little language about
12 impaired/not impaired and these other deadlines.

13 My preference would be for counsel to work on an
14 agreed form, and if you can do it on your own, I'm happy to
15 wait and take your advice on that. If you think it would be
16 constructive, I could have a meet and confer as long as you
17 want it or as short as you want it. I could have a hearing at
18 2 o'clock this afternoon, or I could just let you work it out.
19 I'm really up to having your agreement what to do, but maybe
20 would be to have a hearing either later today or tomorrow, by
21 phone, and I would just decide any matters that aren't
22 resolved. But if you got it all resolved, we don't have to
23 have a hearing.

24 So, Mr. Karotkin, any preference of how to do that,
25 and then I'll ask Mr. Etkin the same thing?

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1 MR. KAROTKIN: As I said, I think if we had the
2 chance, perhaps we could work it all out.

3 THE COURT: Yes.

4 MR. KAROTKIN: But I would ask that if we cannot, that
5 at least we schedule a phone conference for the morning.

6 THE COURT: Okay.

7 MR. KAROTKIN: Because we have time pressures.

8 THE COURT: Yes. Well, I know you have time
9 pressures, and that's why I thought -- and I have time
10 pressures, not only what I worked on this morning, but I
11 haven't even had a chance to look at these. And one of the
12 things that I don't want to waste my time is trying to work my
13 way through a redline if both sides have agreed to a solution.

14 Mr. Etkin, is that agreeable to you, to work it for
15 the rest of today, if necessary, and have a telephone hearing
16 our time tomorrow morning if there's still a dispute, and then
17 I will simply listen to brief argument and make a decision on
18 items that are still in dispute? That work for you?

19 MR. ETKIN: Your Honor, that does would work. I'd be
20 happy. We'll try to work things out. Listening to Mr.
21 Karotkins' list of things that they find that they have issues
22 with, I would think that we may wind up with very little extra
23 to argue about and --

24 THE COURT: Okay.

25 MR. ETKIN: -- we've have a very short hearing, if at

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1 all, tomorrow.

2 THE COURT: Okay. And listen. If you work it out,
3 all you have to do, and Mr. Karotkin and Ms. Kim know how to
4 communicate with my courtroom deputy, and if the message comes
5 in to Ms. Parada that everything's been resolved, then we don't
6 have to have a hearing, and I'll just await an agreed order and
7 notice.

8 Okay. And are you speaking for the committee?

9 MR. RICHARDSON: Yes, Your Honor. David Richardson on
10 behalf of the TCC.

11 THE COURT: Yes.

12 MR. RICHARDSON: Just we have a couple of issues of
13 our own, one of which has been addressed. All we ask is that
14 we be part of this process.

15 THE COURT: Yes.

16 MR. KAROTKIN: Oh, absolutely.

17 THE COURT: Okay. So all right. Let's do this then.
18 Mr. Etkin and Ms. Michelson, to the extent that you're going to
19 be involved. Again, that's not my business who's involved. I
20 will invite the principal counsel that have spoken to see and
21 make a good faith effort to come to a resolution, and I'll set
22 a hearing time for --

23 Ms. Parada, what time? 10 o'clock?

24 THE CLERK: 10 o'clock?

25 THE COURT: At 10 o'clock tomorrow we'll just be

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1 available, with the promise that --

2 Mr. Karotkin, I'll let you be the spokesperson. You
3 notify us or Ms. Parada if we don't need a hearing. And --

4 MR. KAROTKIN: I assume we'd do if by telephone?

5 THE COURT: Yes.

6 MR. KAROTKIN: Okay.

7 THE COURT: Yes. Are you going to be here or back
8 east again?

9 MR. KAROTKIN: I think I've been summoned by Judge
10 Newsome, so I'll be here.

11 THE COURT: I don't care where you are. If you want
12 to be by the phone -- well, good. Go see Judge Newsome. Have
13 fun.

14 Okay. Then good luck, Counsel, for that. I again,
15 as you know, there were difficult issues on this class issue
16 both ways. I'm not happy with a lot of it, and I'm sure both
17 sides of you are not, but I appreciate your working together to
18 try to get it done, and my goal is to get these notices out the
19 door just as soon as we can.

20 So good luck. Hopefully I don't talk to you tomorrow.

21 IN UNISON: Thank you, Your Honor.

22 THE COURT: All right. We're going to adjourn unless
23 someone wants to be heard. Okay. Thank you, all, for your
24 time.

25 (Whereupon these proceedings were concluded at 12:17 PM)

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.



/s/ CLARA RUBIN

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Date: February 27, 2020

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